Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANGELO RODRIGUEZ,

Petitioner,

vs.

THE CITY OF CHICAGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer can satisfy its Title VII duty to reasonably accommodate an employee's religious beliefs by forcing the employee unilaterally to forfeit preexisting rights under a collective bargaining agreement?

2. Whether, contrary to the design of Title VII, an employer can satisfy its procedural Title VII duty to respond to an employee's written request for reasonable accommodation by initially ignoring the employee's request, subsequently presenting the employee with a religious conflict at work, and then only later in litigation proposing that the employee should have accommodated himself under a collective bargaining agreement?

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Petitioner Angelo Rodriguez respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above proceeding on September 21, 1998.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought is reported at 156 F.3d 771 (7th Cir. 1998).[1] That opinion affirmed the judgment of the district court, which is reported at 975 F. Supp. 1055 (N.D. Ill. 1997).[2]

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1998.[3] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1367(a).

STATUTES AND PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e(2)(a):

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j):

The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that

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[1] App. D, p. 20a.

[2] App. C, p. 19a.

[3] App. E, p. 37a.

he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 10.2 of the Agreement Between The City Of Chicago Department Of Police And The Fraternal Order of Police Chicago Lodge No. 7:

The Employer shall not discriminate against officers, and employment-related decisions will be based on qualifications and predicted performance in a given position without regard to race, color, sex, religion, age (40-63), or national origin of the officer nor shall the Employer discriminate against officers as a result of membership in the Lodge. Nothing contained in this Agreement shall be deemed to preclude the mandatory retirement of any officer upon or after the attainment of age 63. Officers shall not be transferred assigned or reassigned for reasons prohibited by this Section 10.2.

General Order 92-1 of the Chicago Police Department, Addendum 1, Section III(C):

No person shall directly or indirectly discriminate against any individual in hiring, classification, grading, discharge, discipline, compensation or other term or condition of employment because of the individual's . . . religion.

STATEMENT OF THE CASE

Petitioner Angelo Rodriguez, a police officer with the respondent City of Chicago, sued the City in the United States District Court for the Northern District of Illinois alleging that the City failed to reasonably accommodate his religious beliefs in violation of Title VII. In litigation, the City argued that Rodriguez should have accommodated himself under his collective bargaining agreement ("CBA") by transferring to another district, even though his CBA guaranteed him the right not to be transferred from his district. The district court granted summary judgment for the City, holding that the transfer option amounted to reasonable accommodation and that the City's failure to raise this option until

litigation did not violate Title VII's procedural requirements. The Seventh Circuit affirmed on both grounds.

A writ of certiorari is requested in this case to allow this Court to review the court of appeals' judgment and opinion.[4] This case presents issues of law that are generally applicable and not bound to the facts of this case. A brief summary of the background facts and the proceedings follows.

Rodriguez's Requests For Accommodation.

Since September 1980, Rodriguez has served as a police officer assigned to the 14th District of the Chicago Police Department ("CPD"), in which two abortion clinics are located. In October 1993, one of the abortion clinics became the scene of a mass demonstration resulting in numerous arrests. Shortly thereafter, the CPD began a practice of detailing officers to abortion clinics on Saturday mornings throughout the City, including at both abortion clinics in the 14th District. Until late 1994, the details occurred only on Saturday mornings. Currently they are activated on an "as needed basis."

Officer Rodriguez has been a life-long Roman Catholic and he accepts the teachings of the Roman Catholic Church that a procured abortion is the wrongful taking of innocent human life and that individuals have a general moral obligation to avoid participating in, or facilitating, a procured abortion. Rodriguez was assigned to the abortion clinic detail on three occasions in the weeks following the October 1993 mass demonstration. He became convinced that his role at the abortion clinics conflicted with his religious beliefs.

In January 1994, he informed one of his supervisors of his religious objections to performing the detail, and for the next three months, Rodriguez was not assigned to the detail. He left active duty for five months, and on his return, presented a formal memo for consideration to his District Commander in which he requested to be exempted from the detail.

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[4] App. D, p. 20a; App. E, p. 37a.

His district commander, however, regarded the memo as inconsistent with the duties of a police officer, even though he thought "hypothetically" he could have honored Rodriguez's request. In all events, the commander never even responded to Rodriguez's request.

The Department's Rebuff Of Rodriguez's Requests.

On the morning of Saturday, November 19, 1994, 14th District supervisors made staff assignments for the abortion clinic detail that day. Late that morning, Rodriguez was on patrol when he was directed to relieve an officer at the detail. Rodriguez requested and was granted an opportunity to discuss the matter with one of his other supervisors, who told him that his religious beliefs could not excuse him from the assignment. Rodriguez thereupon performed the assignment, but under protest.

This assignment to the detail forced Rodriguez to choose between his job and his religion. Fearing the prospect of additional abortion clinic details, he used his vacation time to take off additional Saturdays, until a health condition required him to take a desk job. He later resumed active duty and has tried to avoid assignment to the detail, principally by seeking out-of-district assignments on those days when the detail might be conducted. Because the detail is currently activated on an as-needed basis, however, he has no advance warning of when the CPD will conduct the detail and he is at risk of assignment there in the event he cannot so adjust his schedule to avoid it. If Rodriguez refuses to report to the detail he will be fired.

As a police officer, Rodriguez has been covered by a collective bargaining agreement ("CBA") between the City and the Fraternal Order of Police Chicago Lodge No. 7. He has rights that he earns on the basis of his seniority. Among those rights is the right to bid to transfer to some other police district or to some other work shift. More importantly, he has a right not to be transferred against his will, and Section 10.2 of his CBA specifically protects him from being "transferred[,] assigned or reassigned" for religious reasons.

Because the procedural posture below was one of summary judgment, Rodriguez was and remains entitled to his factual assertion that the CPD can accommodate his religious beliefs without incurring any undue hardship on CPD operations. The CPD can readily find some other officer than Rodriguez to serve at the abortion clinic detail and Rodriguez has agreed to serve at the detail in the event of any emergency, a condition that is governed by clear CPD guidelines and that Rodriguez's supervisors are confident that he would observe.

Procedural History.

On September 20, 1995, Rodriguez filed suit against the City asserting four claims: (1) Count I alleged religious discrimination under Title VII for assigning Rodriguez to the abortion clinic detail on November 19, 1994; (2) Count II alleged religious discrimination under the Municipal Code of the City of Chicago for the same incident; (3) Count III alleged a violation under the Religious Freedom Restoration Act of 1993;[5] and (4) Count IV sought injunctive relief to enjoin the City from assigning Rodriguez to the abortion clinic detail except in the event of an emergency.

The City moved to dismiss Rodriguez's Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action, but the district court denied the motion as to Counts I, III, and IV, while granting it as to Count II.[6] Following discovery, the parties filed and briefed cross-motions for summary judgment. The district court denied Rodriguez's motion, but granted the City's. Rodriguez appealed under 28 U.S.C. § 1291(a) to the Seventh Circuit Court of Appeals, which, on September 21, 1998, affirmed the district court's grant of summary judgment against him.[7]

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[5] 42 U.S.C. §§ 2000bb to 2000bb-4.

[6] App. A, p. 1a.

[7] App. D, p. 20a.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's decision allowing an employer to satisfy its Title VII duty of reasonable accommodation by forcing an employee unilaterally to forfeit collective bargaining rights presents an important federal question that has not been, but should be, settled by this Court.

This case is about the relationship between the duty of employers under Title VII to reasonably accommodate their employees' religious beliefs and the rights of those employees under their federally-protected CBAs. Only twice in the last 26 years since Congress amended Title VII to impose a duty of reasonable accommodation on employers has this Court examined the scope of this duty.[8] This case picks up where one of those cases, *Trans World Airlines, Inc. v. Hardison*,[9] left off.

Title VII obligates an employer, such as the City, to honor an employee's religious observances or practices unless the employer is "unable to reasonably accommodate an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[10] This Court has held that the statute is violated if an employer fails to "make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."[11] The only way an employer may avoid accommodating an employee's religious beliefs is to show it is

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[8] *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

[9] 432 U.S. 63.

[10] 42 U.S.C. § 2000e(j).

[11] *Hardison*, 432 U.S. at 74. *See also Philbrook*, 479 U.S. at 68 ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.'") (quoting 42 U.S.C. § 2000e(j)).

"unable to offer any reasonable accommodation without such hardship."[12]

The Court addressed one aspect of this duty in *Hardison*, in which an employee, who lacked sufficient seniority under his CBA to avoid working all Sabbath days, argued that his employer (and union) had to let him take off additional Sabbath days and step over the seniority rights of other employees. The narrow issue framed in *Hardison* was whether the employer was required to "take steps inconsistent with the otherwise valid agreement."[13]

Noting that the Congress had not authorized the abrogation of CBA rights under Title VII, the Court resolved this issue by ruling that the employer was not required "to carve out an exception to its seniority system in order to help Hardison to meet his religious obligations."[14] All proposed alternatives would have either infringed on other employee's rights under the CBA or involved some cost to the employer which was more than *de minimis*. While concluding that the employee had been accommodated under that CBA, the Court held that neither the CBA nor a seniority system could be used to violate an employer's affirmative obligation to accommodate an employee's beliefs.[15] The lower courts have consistently observed this rule.[16]

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[12] *Philbrook*, 479 U.S. at 68-69.

[13] *Hardison*, 432 U.S. at 79.

[14] *Id.* at 78.

[15] *Id.* at 79.

[16] *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1020-21 (10th Cir. 1994) (ruling that employer had satisfied burden of reasonable accommodation because the accommodation requested would violate the terms of the CBA); *Mann v. Frank*, 7 F.3d 1365, 1369 (8th Cir. 1993) (similar); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) (similar); *Lake v. B.F. Goodrich Co.*, 837 F.2d 449, 451 (11th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988) (similar); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1027 (5th Cir. 1984) (similar); *Blair v.*

Not addressed in *Hardison* was whether an employer could satisfy its affirmative obligation to accommodate an employee's beliefs under Title VII by requiring the employee to forfeit *his own* CBA rights. The Seventh Circuit Court of Appeals has now answered this question squarely in the affirmative. It has ruled that an employee can be required to forfeit his own contract rights (such as the right not to transfer) to satisfy the employer's affirmative duty of reasonable accommodation. The City of Chicago had freely bargained with Rodriguez's union to give police officers the right to stay in the district and shift of their choice. Moreover, Rodriguez's contract explicitly gave him the right not to be "transferred[,] assigned or reassigned" based on his religious beliefs. Notwithstanding these rights – and their importance under our national labor scheme – the Seventh Circuit held that the City could divest Rodriguez of his CBA rights as a *quid pro quo* for religious accommodation.

The entire analysis of its decision is contained in a single paragraph:

> Officer Rodriguez contends that this provision [of the CBA] entitles him to stay in the shift and district of his choice and that the City's proposed accommodation would therefore violate this provision by requiring him to transfer to a different district because of his religion. We cannot accept Officer Rodriguez's interpretation of Section 10.2 of the CBA. *Section 10.2 clearly delineates that the City may not force Officer Rodriguez to transfer to another district because of his religion; it does not foreclose the City from offering him a transfer as a reasonable accommodation of his religious beliefs.*[17]

Graham Correctional Ctr., 782 F. Supp. 411 (C.D. Ill. 1992), *aff'd*, 4 F.3d 996 (7th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994); *Moore v. A.E. Staley Mfg. Co.*, 727 F. Supp. 1156 (N.D. Ill. 1989).

[17] App. D, p. 31a (emphasis added).

But in the face of religious discrimination under Title VII and the prospect of being fired unless he tolerates such discrimination, Rodriguez is being "force[d] . . . to transfer to another district because of his religion."

Nowhere does the Seventh Circuit explain how Rodriguez can continue to possess the right not to be forced to transfer to another district, while at the same time the City can "offer[]" him "a transfer as a reasonable accommodation of his religious beliefs." Either he accepts the "accommodation" and gives up a CBA right, or he keeps all of his CBA rights but receives no accommodation. He can have a Title VII right, or his CBA rights, but not both.

Nor is this sort of conundrum sanctioned by any other lower court since *Hardison*. Although some courts have allowed employers to look to the CBA rights of an employee in working out an accommodation, not one of those cases countenances the outright forfeiture of CBA rights.[18] Other courts, most notably the Sixth Circuit, have indicated that an employer may *not* satisfy its duty of reasonable accommodation at the expense of an employee's collective bargaining rights.[19]

For five reasons, the Seventh Circuit's decision raises an important question of federal law that has not been, but should be, settled by this Court.

First, the question concerns the fundamental relationship between two well-established national priorities: the prohibition of

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[18] *Wright v. Runyon*, 2 F.3d 214 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994); *Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 265-67 (9th Cir. 1988); *Getz v. Pennsylvania, Dep't of Pub. Welfare*, 802 F.2d 72, 73 (3d Cir. 1986); *American Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772 (9th Cir. 1986); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985).

[19] *See, e.g., Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994); *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448 (W.D. Mich. 1986), *appeal dismissed on other grounds*, 815 F.2d 76 (6th Cir. 1987).

religious discrimination and the protection of federally secured CBA rights. "The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy."[20] Indeed, enforcement of those prohibitions is of the "highest priority."[21] At the same time, the collective bargaining process "lies at the core of our national labor policy. . .."[22] The Seventh Circuit's decision unnecessarily puts these two policies in tension by declaring that an employer may require an employee to forfeit his federally-secured contract rights to satisfy the employer's duty of reasonable accommodation. The decision requires the employee to elect between his contract rights and his Title VII rights without letting him have both. In turn, Title VII is effectively emasculated because it offers no independent protection to the employee.

Second, the question is important because it directly concerns the proper relationship between the judiciary and Congress. In *Hardison*, the Court refused to hold "that an agreed-upon seniority system must give way when necessary to accommodate religious observances" principally because there was no "clear and express indication from Congress,"[23] whether by "clear statutory language or legislative history . . . ."[24] Yet despite a similar absence of clear congressional indication, the Seventh Circuit has now held that agreed-upon, seniority-based rights of a Title VII claimant may nevertheless "give way" when the employer decides not to take any affirmative steps to reasonably accommodate the claimant's religious

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[20] *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

[21] *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)).

[22] *Hardison*, 432 U.S. at 79.

[23] *Id.*

[24] *Id.* at 85.

beliefs. In short, the Seventh Circuit has rendered a decision in a realm which this Court has specifically indicated should be left to Congress.

Third, and relatedly, the question presented is important because it affects the civil rights and labor rights of a large section of the American workforce. More than 16.1 million American workers are covered under CBAs.[25] Assuming that such workers are as religiously committed as the rest of the American population, as many as 87% of those workers consider religion to be "very important" or "fairly important" in their lives.[26] If the Seventh Circuit's decision is allowed to stand, 14 million workers therefore would be at risk of having their employers divest them of federally secured contract rights to resolve religious conflicts and to satisfy these employers' substantive Title VII obligations. At a time when religious discrimination claims are substantially increasing,[27] the Court can eliminate this risk by granting certiorari.

Fourth, and more broadly, the question presented is important because of the interconnectedness of other federal and state civil rights laws. Decisions concerning "reasonable accommodation" under Title VII may affect issues of "reasonable accommodation"

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[25] Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics, *Union Members Survey* (last modified Dec. 2, 1998) <http://stats.bls.gov/news.release/union2.nws.htm>.

[26] Princeton Religion Research Center, *Religion in America* 1992-93, at 55 (1993).

[27] Religious discrimination claims filed with the EEOC have increased 43% since 1991. *See* Equal Employment Opportunity Commission, *Religion-Based Charges FY 1991-1997* (last modified Aug. 11, 1998) <http://www.eeoc.gov/stats/religion.html> (showing 1709 claims filed in fiscal year 1997 as compared to 1192 claims filed in fiscal year 1991).

under the Americans with Disabilities Act,[28] just as other constructions of Title VII have affected the interpretation of other civil rights statutes.[29] And as this Court recognizes, "[m]any States look to Title VII law as a matter of course in defining the scope of their own laws."[30] Accordingly, the Court should grant certiorari to prevent an erroneous doctrine from poisoning the interpretation of other federal and state civil rights statutes.

Finally, the question presented is important because – following the demise of the Religious Freedom Restoration Act of 1993[31] – Title VII provides the only remaining source of federal

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[28] *See, e.g., Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1048-49 (7th Cir. 1996) (recognizing that concepts of "reasonable accommodation" under Title VII may be useful in determining accommodation issues under the Americans With Disabilities Act), *cert. denied*, __ U.S. __, 117 S. Ct. 1318 (1997). *See also Zimring v. Olmstead*, 138 F.3d 893, 902 (11th Cir. 1998) (relying on a Title VII principle to interpret the ADA), *cert. granted*, __ U.S. __, 67 U.S.L.W. 3259 (U.S. Dec. 14, 1998) (No. 98-536); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3d Cir. 1995) (specifying that standards under Title VII should inform the meaning of standards under the ADA).

[29] *See, e.g., Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412-17 (1985) (looking to Title VII and its construction to construe the meaning of the ADEA); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (same); *Preston v. Commonwealth of Va. ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994) (looking to Title VII to construe discrimination claims under Title IX); *Lipsett v. University of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) (similar).

[30] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983). *See, e.g., Soldinger v. Northwest Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 761-66 (Cal. Ct. App. 1996) (applying *Hardison* and federal case law in rejecting an employer's claim that the employee should have availed herself of her rights under her CBA to satisfy the employer's duty of reasonable accommodation under California law). Indeed, the CPD's own General Order 92-1, which Rodriguez had invoked in this case, is a municipal administrative rule which is construed entirely with respect to Title VII law.

[31] *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA, 42 U.S.C. §§ 2000bb to 2000bb-4, at least as applied to state and local governments).

protection for state and local employees against incidental discrimination. Under RFRA, a government that substantially burdens an employee's religious practice was required to demonstrate that the burden was the least restrictive means of serving a compelling interest. With RFRA now unavailable, state and local government employees (such as petitioner) who face religious discrimination possess only Title VII rights, and therefore it is vital that the scope of these rights and the corresponding duties of employers be clearly delineated. The Court can provide this much-needed clarity and predictability by granting certiorari in this case.

II The Seventh Circuit's decision allowing an employer to initially ignore a written request for religious accommodation, to subsequently present the employee with a religious conflict, and then to propose in litigation that the employee should have accommodated himself under a CBA is in conflict with the decisions of the Fourth, Sixth, Ninth, and Tenth Circuits and raises an important federal question that has not been, but should be, settled by this Court.

This Court ruled in *Philbrook* that an employer must make some effort to accommodate an employee's religious beliefs, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operations of the employer.[32] If the employer proposes an accommodation that is "reasonable" then the statutory inquiry is "at an end."[33]

The lower courts before and after *Philbrook* have articulated the prima facie elements of a case for religious discrimination under Title VII for failure to accommodate an employee's religious beliefs. The employee must establish that (1) he had a bona fide religious

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[32] 479 U.S. at 68-69.

[33] 479 U.S. at 69 (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982)).

belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him or subjected him to discriminatory treatment.[34]

Conversely, the courts are clear that "[o]nce an employee proves a prima facie case under Title VII, the burden shifts to the employer to show that it undertook some initial step to reasonably accommodate the religious beliefs of that employee."[35] Courts often invoke the concept of "good faith" to describe the employer's obligation in working with the employee to resolve the religious conflict.[36] An employer who ignores an employee's request for accommodation does so at its peril. For unless the employer can demonstrate that the accommodation requested imposes an undue

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[34] *See Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 58 (1997); *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1467 n. 9 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1819 (1997); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *Beadle v. City of Tampa*, 42 F.3d 633, 636 n. 4 (11th Cir. 1995), *cert. denied*, 515 U.S. 1152 (1995); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994); *Wright v. Runyon*, 2 F.3d 214, 216 n. 4 (7th Cir. 1993); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133 (3d Cir. 1986), *cert. denied*, 479 U.S. 972 (1986); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

[35] *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993). *See also supra* note 34 (citing cases).

[36] *See Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998); *Getz v. Commonwealth of Pa., Dep't of Pub. Welfare*, 802 F.2d 72, 73 (3d Cir. 1986); *Turpen.*, 736 F.2d at 1028; *Gordon v. MCI Telecommunications Corp.*, 791 F. Supp. 431, 434 (S.D.N.Y. 1992); *Wangsness v. Watertown Sch. Dist. No. 14-4 of Codington County, S.D.*, 541 F. Supp. 332, 336-37 (D.S.D. 1982).

hardship, the employer is bound to accept the employee's request.[37] Accordingly, to ensure that employers and employees will mutually aim to communicate regarding an employee's request for religious accommodation, this Court has observed that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."[38]

Consistent with this admonition, four circuits have held that an employer can be found liable under Title VII for rebuffing an employee's request for accommodation and making "no effort" to provide it: the Fourth,[39] the Sixth,[40] the Tenth,[41] and the Ninth.[42] Other lower courts have ruled similarly.[43] Indeed, even if a CBA

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[37] *Heller*, 8 F.3d at 1440. *See also Toledo*, 892 F.2d at 1487-88; *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

[38] *Philbrook*, 479 U.S. at 69 (quoting *Brener*, 671 F.2d at 145-46).

[39] *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988).

[40] *EEOC v. University of Detroit*, 904 F.2d 331, 334-35 (6th Cir. 1990); *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988).

[41] *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1487-89 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990).

[42] *Heller*, 8 F.3d at 1440; *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989); *Townley*, 859 F.2d at 615; *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Anderson v. General Dynamics*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

[43] *See Breech v. Alabama Power Co.*, 962 F. Supp. 1447, 1456 (S.D. Ala. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 117 (1998); *Drawzewski v. Waukegan Dev. Ctr.*, 651 F. Supp. 754, 759 (N.D. Ill. 1986); *Padow v. White*, 465 F. Supp. 602, 607 (S.D. Tex. 1979). *See also* EEOC Guidelines

may provide the means by which the employee can avoid a religious conflict, an employer still has an affirmative duty to respond to an employee's request for accommodation.[44]

In direct conflict with this authority is the Seventh Circuit, which ruled that an employer can completely ignore an employee's request for accommodation if a CBA exists that may happen to give the employee a means of eliminating the conflict. As the Seventh Circuit stated: "Although Commander Velez's failure to respond to Officer Rodriguez's formal request gives us some pause, we conclude that the City satisfied its duty in this regard by engaging in the collective bargaining process with Officer Rodriguez's union."[45]

Thus, while four circuits would find an employer liable for making no effort in response to an employee's request for accommodation, the Seventh Circuit absolves the employer from liability in refusing to even *respond* to an employee's request for accommodation, *and* deny it, *and* make no effort to provide it. In contrast to the other circuits, the Seventh Circuit has discarded the requirement of "bilateral cooperation" between the employee and employer that Title VII contemplates and that *Philbrook* propounded.

On Discrimination Because Of Religion, 29 C.F.R. § 1605.2(c)(1) ("*After* an employee . . . notifies the employer . . . of his or her need for a religious accommodation, the employer . . . has an obligation to reasonably accommodate the individual's religious practices.") (emphasis supplied).

[44] Thus in *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), the Ninth Circuit Court of Appeals rejected the employer's argument that it was unable to reasonably accommodate certain Sabbatarian employees because it was bound by its CBA to schedule employees on the basis of seniority. The court found that the employer made no attempt to solve the employees' religious conflict, and had "essentially used the seniority provision of the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate its employees' religious needs." *Id.* at 1513. *See also Soldinger v. Northwest Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 761-66 (Cal. Ct. App. 1996) (similar ruling).

[45] App. D, p. 31a.

This split of authority, in and of itself, is sufficiently stark to warrant review of the question presented. In addition, the question presented is important because it concerns the core purposes and practical effectiveness of Title VII. Congress designed the remedial measures in Title VII to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.[46] "Voluntary compliance with Title VII also is an important public policy[;] Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII."[47]

But the Seventh Circuit's decision excuses an employer from its procedural Title VII duty to ever respond to an employee's request for accommodation, even where the employee asks in writing for an accommodation and is forced to suffer a religious conflict because of the silence of the employer. Allowing the Seventh Circuit's decision to stand would undercut the mandates of employer self-evaluation and voluntary compliance and would, in turn, undermine the prophylactic and remedial purposes of Title VII. Accordingly, this Court should grant certiorari and resolve this question.

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[46] *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995) (internal quotations and citations omitted).

[47] *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 770-71 (1983).

CONCLUSION

For the reasons stated above, petitioner Angelo Rodriguez respectfully requests this Court to grant a writ of certiorari to the Seventh Circuit Court of Appeals to resolve the questions presented herein.

Respectfully submitted,

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APPENDIX A
Filed 9/21/98

ANGELO RODRIGUEZ,
Plaintiff,
v.

THE CITY OF CHICAGO,
Defendant,

No. 95 C 5771
Hon. George M. Marovich

MEMORANDUM OPINION AND ORDER

Now before the Court is Defendant City of Chicago's ("the City") motion to dismiss Plaintiff Angelo Rodriguez's ("Rodriguez") claims of religious discrimination arising out of the Police Department's refusal to excuse Rodriguez, a Roman Catholic officer, from serving on abortion clinic detail. For the reasons set forth below, this Court grants in part and denies in part the City's motion to dismiss.

BACKGROUND

Since September 1980, Rodriguez has served as a patrol officer in the Chicago Police Departments's 14th District.[1] Located within the 14th District are two clinics at which abortions are performed: (1) the Central Medico Pan American Clinic, located at 3412 W. Fullerton Ave. ("the Fullerton Clinic"), and (2) the American Women's Medical Center, located at 2744 N. Western Ave. ("the Western Clinic").

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[1] The 14th District covers the Humbolt Park area, and is bounded by Belmont Avenue on the North. Division Street on the South, the Chicago River on the East, and Central Park on the West.

Following a mass demonstration at the Fullerton Clinic on October 23, 1993, the Police Department began to assign one or more officers to abortion clinics throughout the City purportedly to protect the clinics' property and to assure the safety of the clinics' employees. Rodriguez was one of the officers assigned to maintain a presence outside the Fullerton Clinic.

On the first day of his new assignment, Rodriguez reported to the Fullerton Clinic and performed his duties. Roughly two or three weeks later, when he was again assigned to the Fullerton Clinic detail, Rodriguez similarly reported and fulfilled his monitoring obligations. Following his second assignment to the Fullerton Clinic, however, Rodriguez became convinced that his presence at the clinic facilitated the ongoing activities of the abortion clinic and, consequently, conflicted with his Roman Catholic beliefs.

On January 29, 1994, Rodriguez informed his watch commander, Captain William Guswiler ("Guswiler"), of his religious opposition to serving on the Fullerton Clinic detail. Guswiler agreed to exclude Rodriguez from further abortion clinic assignments, and, in turn, Rodriguez agreed to be available to assist at the clinics in the event of an emergency breach of the peace. For three months thereafter, Rodriguez was not assigned to the Fullerton Clinic watch.

On April 27, 1994, Rodriguez tore his left achilles' tendon and was placed on medical leave. Upon returning to work in September 1994, Rodriguez sought to assure that he would not again be assigned to active duty at either the Fullerton Clinic or the Western Clinic. To this end, Rodriguez sent a memorandum dated October 7, 1994 to 14th District Commander Jose Velez ("Velez") in which Rodriguez stated that his "religious belief that human life begins a [*sic.*] conception and that abortion is the intentional killing of a human being prohibits my participation in keeping abortion clinics open."

Subsequently, on November 19, 1994, Rodriguez was ordered by his supervisor, Sergeant Ronald Grimes ("Grimes"), to relieve the officer detailed at the Western Clinic. Rodriguez informed Grimes of Guswiler's previous agreement not to assign

Rodriguez to the abortion clinic detail and reasserted his religious opposition to serving on that detail. Grimes indicated that he was unaware either of Rodriguez's prior arrangement with Guswiler or of Rodriguez's memo to Velez, and refused to excuse Rodriguez from his assignment at the Western Clinic. Under protest, Rodriguez agreed to, and did, in fact, report to the Western Clinic.

Rodriguez brought his suit against the City alleging that the City's refusal to excuse him from the abortion clinic detail violated the Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000(e) *et seq.*, the Municipal Code of the City of Chicago, and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1(c) *et seq.*. The City maintains that Rodriguez's various claims should be dismissed for the following reasons: (1) Rodriguez has not suffered an "adverse employment action" and, consequently, cannot plead all of the facts necessary to establish a prima facie case of religious discrimination under Title VII; (2) even if Rodriguez could establish a prima facie case of discrimination, the City's failure to accommodate Rodriguez's beliefs is not violative of Title VII because such accommodation would impose more than *de minimis* cost on the City and would result in "undue hardship"; (3) RFRA is not the source of an independent legal claim for relief, but, rather, merely specifies the standard which should be applied in cases involving laws which burden the exercise of religious beliefs; (4) the City's policy requiring all police officers to be available for all assignments serves a compelling governmental interest and is the least restrictive means of advancing that interest, and, accordingly, that policy satisfies RFRA's strict scrutiny test; and (5) Rodriguez's claim under the City's Municipal Code is inappropriate, as Rodriguez has not exhausted his administrative remedies.

DISCUSSION

When considering a motion to dismiss, the court tests the sufficiency of the complaint, not the merits of the suit. *Triad Assocs. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990). The court must accept as true all well-

pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). A motion to dismiss will be granted only if it is clear that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. Rodriguez's Complaint States A Potentially Valid Title VII Claim

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(c)(1). In order to establish a prima facie case of religious discrimination under Title VII, a plaintiff must show that (1) he has a bona fide religious belief that conflicts with an employment requirement, (2) he informed the employer of this religious belief, and (3) he was disciplined, discharged, or otherwise damaged as a result of his assertion of the conflicting religious belief. *Wright v. Runyon*, 2 F.3d 214, 216 n.4 (7th Cir. 1992), *cert denied*, 114 S. Ct. 1077 (1994); *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986). Once the plaintiff has established a prima facie case, the employer-defendant must demonstrate that it could not, and cannot, accommodate the plaintiff's religious practice without "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-2(a)(1)(j); *Baz*, 782 F.2d at 706.[2]

Here, while the City concedes that Rodriguez properly has alleged that his religious beliefs conflict with his service on abortion clinic detail and that he informed the Police Department of this conflict, the City contends that Rodriguez has failed to allege the third element of his prima facie case — namely, that Rodriguez's assertion of his religious beliefs resulted in an "adverse employment action." Specifically, the City argues that Rodriguez's failure to

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[2] An "undue hardship" is anything more than a *de minimis* cost to the employer. *Trans World Airlines v. Hardison*, 432 U.S. 63, 75 (1977); *Baz*, 782 F.2d at 706.

claim that he has been discharged, disciplined, or otherwise damaged as a result of his efforts to avoid abortion clinic duty due to that duty's inherent conflict with his sincerely-held Catholic beliefs is fatal to Rodriguez's Title VII claim. Yet, the City's position is not supported by the relevant case authority. As correctly noted by Rodriguez, "the threat of discharge (or of other adverse employment practices) is a sufficient penalty" to establish the third element of the prima facie case. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). It is nonsensical to suggest that an employee who, when forced by his employer to choose between his job and his faith, elects to avoid potential financial and/or professional damage by acceding to his employer's religiously objectionable demands has not been the victim of religious discrimination: "An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy." *Id.; see also American Postal Worker's Union v. Postmaster General*, 781 F.2d 772, 774-75 (9th Cir. 1986).[3]

In his Complaint, Rodriguez states:

> 39. Grimes indicated that he was unaware of either matter, and stated that Rodriguez' religious beliefs were not a consideration in making assignments for duty. At no time did Grimes offer to present the issue to the Watch Com-

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[3] The City incorrectly argues that the law of this circuit requires a Title VII plaintiff to allege that he actually suffered an adverse employment action. Yet, the Seventh Circuit has never specifically addressed the issue of whether a mere threat of discharge or discipline is sufficient to satisfy the third element of the prima facie case. However, the vast majority of courts to consider this issue have held that a plaintiff may establish the "discipline or discharge" element by successfully asserting a constructive discharge or discipline claim. *See Wright v. Frank*, 1992 WL 521773, at *7 (E.D. Wis. Jan. 21, 1992), *aff'd*, 2 F.3d 214 (7th Cir. 1993); *Young v. Southwest Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). This Court finds these courts' reasoning to be persuasive in light of the purposes of Title VII and the realities of most employees' economic and professional situations.

> mander (Lt. O'Grady) for his immediate consideration. Grimes said that he made assignments solely on the basis of professional ability, and that he would refuse to change Rodriguez' assignment at the clinic.
>
> 40. Rodriguez told Grimes that he objected to the assignment on the basis of deeply-held religious beliefs and that he would perform the assignment, but under protest. . . .

These allegations suggest that Rodriguez reasonably could have inferred that he would be disciplined for his refusal to comply with Grimes's assignment of Rodriguez to the Western Clinic.[4] Accordingly, Rodriguez has plead all of the necessary elements of a prima facie case of religious discrimination and, accordingly, has stated a potentially valid claim for relief under Title VII.[5]

While the City argues that, Rodriguez's assertion of a prima facie case notwithstanding, a reasonable accommodation of Rodriguez's religious beliefs was, and is, not possible, as acceding to Rodriguez's request to be relieved from his assignment would conflict with the City's policy that "all officers enforce all laws at all times", this argument is not a proper basis for a motion to dismiss.

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[4] While the City contends that Rodriguez's Title VII claim fails because Grimes' actions were not motivated by religious animus, such animus is not essential to Rodriguez's prima facie case. In order to state a potentially valid claim for relief, Rodriguez merely must have alleged (which he has) that Grimes required Rodriguez, under threat of discipline or discharge, to perform abortion clinic duty, notwithstanding that Grimes was aware of Rodriguez's religious opposition to that assignment.

[5] It should be noted that, because Rodriguez first notified the Police Department of his religious opposition to serving on abortion clinic detail in January 1994, Rodriguez cannot establish a prima facie case of religious discrimination with respect to his first two assignments to the Fullerton Clinic in October and November of 1993. Any discrimination claims arising out of these first two assignment are further barred by the fact that these assignments occurred more than 300 days prior to the date on which Rodriguez filed his charge with the EEOC, April 7, 1995. 42 U.S.C. § 2000e-5(e); *Mohasco Corp. v. Silver*, 447 U.S. 807, 810 (1980).

Whether a particular accommodation is "reasonable" or imposes an "undue hardship" on an employer is a question of fact which cannot be resolved on the pleadings alone. *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992); *Nottleson v. Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 452 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Gold v. City of Chicago*, 1986 WL 8394, at *3 n.1 (N.D. Ill. July 21, 1986). Thus, this Court denies the City's motion to dismiss Rodriguez's Title VII claim.[6]

B. Rodriguez Has Pled A Legally Cognizable Claim For Relief Under RFRA

Contrary to the City's contention, RFRA does not merely specify the standard which should be applied in 42 U.S.C. § 1983 cases involving governmental actions and/or policies which burden the exercise of religious beliefs; rather, RFRA provides "a statutory claim or defense to persons whose religious exercise is substantially burdened by the government." *Francis v. Keane*, 888 F. Supp. 568, 572 (S.D.N.Y. 1995); *see also Goodall By Goodall v. Stafford City Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 1995 WL 642278 (Jan. 8, 1996); *Sansett v. Dep't of Corrections*, 891 F. Supp.

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[6] Not only would it be procedurally improper for this Court to resolve the issue of "reasonable accommodation" on the City's motion to dismiss, but there remain a number of legal and factual issues which need to be addressed in greater detail in order to permit this Court to determine whether accommodating Rodriguez's religious beliefs would impose an "undue hardship" on the Police Department. Among these issues are the following: (1) Must the Court restrict its inquiry as to the costs associated with accommodation to the effect of accommodating Rodriguez alone, or may the Court consider the potential precedential impact of requiring the City to accommodate Rodriguez?; (2) In deciding whether accommodating Rodriguez imposes more than a *de minimis* cost on the City, is the Court limited to considering operational costs and/or feasibility or may the Court account for the theoretical (or policy) "costs" associated with accommodation?; and (3) How would accommodating Rodriguez's faith interfere with the effective operation of the Police Department, particularly in light of the fact that the Department previously accommodated Rodriguez?

1305, 1316-17 (W.D. Wis. 1995); *Jolly v. Coughlin*, 894 F. Supp. 734, 740 (S.D.N.Y. 1995). Given that Rodriguez has alleged in his Complaint that serving on abortion clinic detail imposes a substantial burden on the exercise of his sincerely-held Catholic beliefs, Rodriguez has stated a cognizable RFRA claim. *Goodall*, 60 F.3d at 171.

Moreover, as with the City's claim that it cannot accommodate Rodriguez's faith without undue hardship, this Court may not properly consider on a motion to dismiss the City's assertion that its interest in preserving the effectiveness and the integrity of law enforcement is a compelling governmental interest which justifies the burden on Rodriguez's religious beliefs. "Whether an interest is compelling is a question of fact, not properly decided on a motion to dismiss." *Sansett*, 891 F. Supp. at 1315.[7] Thus, the City's motion to dismiss Rodriguez's RFRA claim is denied.

C. *Rodriguez Has Failed To Exhaust His Administrative Remedies With Respect To His Claim Under The City's Municipal Code*

Finally, as to Rodriguez's claim that the City violated Section 2-160-050 of its Municipal Code, the City correctly points out that Rodriguez has failed to exhaust his administrative remedies. Section 2-120-510-(e) of the Municipal Code mandates that employees timely file a complaint with the Chicago Commission on Human Relations ("the Chicago Commission") in order to vindicate their rights under the Human Rights Ordinance. Further, the Chicago Commission has exclusive authority over claims arising under Section 2-160-050. Because Rodriguez failed to file a complaint, or

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[7] It should be noted that many of the same legal and factual issues which would need to be addressed in order for this Court to resolve the "reasonable accommodation" question would also need to be addressed in order for this Court to decide whether the City's interest is truly "compelling" and whether the City's refusal to accommodate Rodriguez is the "least restrictive means" of advancing that interest.

to pursue his "reasonable accommodation" action, with the Chicago Commission, Rodriguez cannot advance his Municipal Code claim in this proceeding. *Mein v. Masonite*, 109 Ill. 2d 1, 7, 485 N.E.2d 313, 315 (1985); *Ahern v. Board of Education of the City of Chicago*, 1992 WL 373030, at *4 (N.D. Ill. 1992). Thus, the City's motion to dismiss Rodriguez's Municipal Code claim is granted.

CONCLUSION

For the foregoing reasons, this Court grants the City's motion to dismiss as to Rodriguez's Municipal Code claim and denies the City's motion to dismiss as to Rodriguez's Title VII and RFRA claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANGELO RODRIGUEZ,
Plaintiff,

v. No. 95 C 5371
Judge George M. Marovich

THE CITY OF CHICAGO,
a municipal corporation,
Defendant

MEMORANDUM OPINION AND ORDER

Plaintiff Angelo Rodriguez ("Rodriguez") filed this action against Defendant City of Chicago, Department of Police (the "City") for religious discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, as amended, and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-l(c) *et seq.* Both parties now move for summary judgment. For the reasons set forth below, the Court denies Rodriguez's motion for summary judgment and grants the City's motion for summary judgment.

BACKGROUND

Unless otherwise noted, the following facts are undisputed. Since September 1980, Rodriguez has served as a patrol officer in the Chicago Police Department's 14th District. Located within the 14th District are two clinics at which abortions are performed: (1) the Central Medico Pan American Clinic, located at 3412 W. Fullerton Ave. ("the Fullerton Clinic"), and (2) the American Women's

Medical Center, located at 2744 N. Western Ave. ("the Western Clinic").

Following a demonstration at the Fullerton Clinic on October 23, 1993, the Police Department began to assign one or more officers to abortion clinics throughout the City to protect the clinics' property and to assure the safety of the clinics' employees. According to the City, the purpose of the assignments is to keep the peace between demonstrators. Rodriguez was one of the officers assigned to maintain a presence outside the Fullerton Clinic.

On the first day of his new assignment, Rodriguez reported to the Fullerton Clinic and performed his duties. Roughly two or three weeks later, when he was again assigned to the Fullerton Clinic detail, Rodriguez similarly reported and fulfilled his monitoring obligations. Rodriguez testified that following his second assignment to the Fullerton Clinic, however, he became convinced that his presence at the clinic facilitated the ongoing activities of the abortion clinic and, consequently, conflicted with his Roman Catholic beliefs.

On January 29, 1994, Rodriguez informed his watch commander, Captain William Guswiler ("Guswiler"), of his religious opposition to serving on the Fullerton Clinic detail. Rodriguez told Guswiler that he did not have any problem going to the clinic in an emergency situation, but other than that he did not want to be assigned to abortion clinics. Guswiler told Rodriguez that he would try not to assign him to abortion clinics, but that he (Guswiler) could not give Rodriguez any guarantee or formal "exemption" from such work. Rodriguez agreed to be available at the clinics in the event of any emergency. For four months thereafter, Rodriguez was not assigned to the Fullerton Clinic watch.

On April 25, 1994, Rodriguez tore his left Achilles tendon and was placed on medical leave. Upon returning to work in September 1994, Rodriguez sought to assure that he would not again be assigned to active duty at either the Fullerton Clinic or the Western Clinic. To this end, Rodriguez sent a memorandum dated October 7, 1994 to 14th District Commander Jose Velez ("Velez") in which Rodriguez stated that his "religious belief that human life

begins at conception and that abortion is the intentional killing of a human being prohibits my participation in keeping abortion clinics open." The memorandum requested that Rodriguez be exempted from future assignments at abortion clinics because of these religious beliefs.[1]

Upon receipt of the memorandum, Guswiler spoke with Velez and they agreed that Rodriguez was not free to refuse an assignment. The City maintains that Guswiler and Velez further agreed that, depending on operational needs, Guswiler would, when possible, avoid assigning Rodriguez to clinic duty. In any event, Rodriguez never received a written response to his memorandum from Velez or anyone else at the City.

Subsequently, on November 19, 1994, Police Officer Tietz, who was assigned to one of the abortion clinics in the 14th District, requested a replacement to take a "personal."[2] Rodriguez was assigned to replace Officer Tietz, and directed to report to the abortion clinic detail. Rodriguez then requested a personal and went to speak to his supervisor, Sergeant Ronald Grimes ("Grimes"), in the 14th District station. Rodriguez informed Grimes that he objected to the abortion clinic assignments, but Grimes responded that Rodriguez could not refuse the assignment.[3] Under protest Rodriguez agreed to, and did report to the Western Clinic for approximately one-half hour until the assignment was canceled. Rodriguez asserts, and the City denies, that the situation ultimately forced Rodriguez to choose between his job and his religious beliefs.

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[1] For purposes of this motion, the City does not challenge the authenticity of Rodriguez's beliefs.

[2] Police officers may request relief (a "personal") for various reasons, for example, to use the bathroom.

[3] Rodriguez testified that he informed Grimes about his memo and his prior "arrangement" with Guswiler, but that Grimes still refused to take him off the assignment. Grimes denied this conversation occurred.

Rodriguez has not been assigned to any further abortion clinic details since November 1994.

Rodriguez brought this suit against the City alleging that the City violated his rights under Title VII, RFRA, and the Municipal Code of the City of Chicago ("Municipal Code"). On January 12, 1996, the Court granted the City's motion to dismiss the claim under the Municipal Code, and denied its motions to dismiss the claims under Title VII and RFRA. Pursuant to the recent United States Supreme Court decision in *Boerne v. Flores*, 117 S.Ct. 2157 (1997), which held RFRA unconstitutional, both parties have agreed to the dismissal of the RFRA claim, leaving only the Title VII claim.

DISCUSSION

I. *Standards for Summary Judgment*

Summary judgment is appropriate where the pleadings, answers to interrogatories, admissions, affidavits, and other materials show that there is "no genuine issue as to any material fact" and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Only genuine disputes over "material facts" can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are those that might affect the outcome of the suit under governing law. *Id.* A "genuine issue" exists if there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 249. When considering a motion for summary judgment, the Court must view the facts, and all inferences drawn from the facts, in the light most favorable to the nonmovant. *Griffin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991); *Roman v. U.S. Postal Serv.*, 821 F.2d 382, 385 (7th Cir. 1987).

II *Rodriguez's Title VII Claim*

Under Title VII, it is unlawful to discriminate against an individual because of that individual's religion. 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined, however, to include only those "aspects of religious observance and practice" that an employer is

able to "reasonably accommodate . . . without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 & n.1 (1986).

For purposes of its summary judgment motion, the City has conceded that Rodriguez has established a prima facie case of religious discrimination.[4] Thus, the burden now shifts to the City to make a reasonable accommodation of Rodriguez's religious beliefs or to show that any accommodation would result in undue hardship. *E.E.O.C. v. Ilona of Hungary, Inc.*, 97 F.3d 204, 210 (7th Cir. 1996); *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986). The only question before the Court is whether the City failed to reasonably accommodate Rodriguez's refusal to perform the abortion clinic detail.

A reasonable accommodation of an employee's religion is one that "eliminates the conflict between employment requirements and religious practices . . .." *Philbrook*, 479 U.S. at 70. Title VII requires that the employer provide only "reasonable accommodation," not satisfaction of an employee's every desire. *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994). Furthermore, "the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. . . [W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternatives would result in undue hardship." *Philbrook*, 479 U.S. at 68.

Rodriguez argues that the City should have agreed to his proposed accommodation by keeping him off the abortion clinic detail before the alleged incident of discrimination took place on November 19, 1994. Rodriguez maintains that exempting him from abortion clinic detail was a reasonable accommodation, and one that the City could have provided without undue hardship. The City responds that exempting Rodriguez -- or any other officer -- from an

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[4] The City reserves its right to appeal this issue.

assignment that conflicts with his religious beliefs would result in undue hardship to the City. More importantly though, the City contends that there were several alternative accommodations available to Rodriguez that he declined to utilize.

Specifically, under Section 23-8 of the governing union contract, police officers may bid to transfer between districts. Bids are granted on the basis of seniority. The City asserts, and Rodriguez does not dispute, that there are at least six alternative districts on the north side of the City that do not have abortion clinics and have comparable levels of crime and police facilities to those in the 14th District. With his seniority, Rodriguez would apparently be able to bid into any of those districts with no reduction in his level of pay or benefits. The City has described several additional alternatives available to Rodriguez to accommodate his religious beliefs including applying for a "special function assignment," changing his shift, changing his start time, using time due, and using unpaid leave.[5]

Rodriguez concedes that bidding on a transfer to another district that has no abortion clinics would, for the most part, accommodate his religious beliefs. Rodriguez also grudgingly concedes that he has no specific objections to transferring districts. Nevertheless, he maintains that he should not have to transfer districts when the City can accommodate his religious beliefs to avoid the abortion clinic detail in the 14th District without any undue hardship. The Supreme Court, however, disagrees and has declared:

> We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.

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[5] Rodriguez acknowledges that he has been avoiding clinic duty since November 1994 by changing to a later starting time, taking some Saturdays off, and accepting special function assignments out of the 14th District.

Philbrook, 479 U.S. at 68. Nevertheless, Rodriguez argues that his case is an exception to this general proposition because the City "ignored" his request for an accommodation and failed to take the initial step towards accommodating his religious beliefs.

At the outset, the Court notes that it is undisputed that as a 16-year veteran of the police force, Rodriguez was aware of the options available to him under the union contract that could accommodate his religious conflict. But, Rodriguez wanted a different accommodation; he wanted to stay in the 14th District and be exempt from abortion clinic duty. To this end, Rodriguez made an informal deal with Guswiler. Rodriguez agreed to go to the clinic in an emergency situation and Guswiler agreed to try to keep Rodriguez off clinic detail. Rodriguez knew that this was a makeshift solution and that there was no guarantee from Guswiler or the City that it would prevent him from being assigned to clinic duty. Rodriguez knowingly chose this accommodation over the other alternatives available to him under the union contract and accepted the risk that it might not last.

Whether or not he received a formal response to his October memorandum, Rodriguez was clearly aware that the City was unwilling to honor his deal with Guswiler on a formal or permanent basis. When the City assigned Rodriguez to guard the clinic on November 19, 1994, it did not discriminate against him because of his religion. This was a risk Rodriguez knew existed, and he consciously elected not to choose the option which would have prevented this possibility. Rodriguez, not the City, is therefore responsible for the consequences. *See Wright*, 2 F.3d at 216 (employee who chose not to take full advantage of employer bidding system is responsible for consequences).

The Court concludes that reasonable accommodations were available to Rodriguez that would have eliminated his religious conflict. Rodriguez was aware that these accommodations existed, but chose not to take full advantage of them. Under these circumstances, the Court does not believe that the City was required to

formally reiterate these alternatives in response to Rodriguez's memorandum in order to discharge its obligations under Title VII.

Rodriguez maintains that the City is barred from asserting provisions of the union contract as "after-the-fact" accommodations because it ignored Rodriguez's original request for an accommodation in his October 1994 memorandum. As discussed above, the Court does not agree with Rodriguez's characterization of the union contract as an "after-the-fact" accommodation. The contract provision at issue was in place prior to Rodriguez's problems with the clinic detail and Rodriguez admits that he was aware of his rights under the union contract to request a transfer to another district. The essence of Rodriguez's objection to the transfer at this time is that the City has waived its ability to defend this lawsuit by failing to raise the accommodation earlier -- before this litigation began.

Rodriguez has offered no legal support for the "waiver" rule that he is proposing to this Court. Instead, Rodriguez relies on *Toledo v. Nobel-Sysco. Inc.*, 892 F.2d 1481, 1488 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990), where the court ruled that a settlement offer, made in the course of administrative proceedings, could not be considered as an accommodation in defense of a Title VII lawsuit. Unlike the facts in *Toledo*, the accommodation described by the City was not offered to Rodriguez as a settlement after the commencement of legal or administrative proceedings. The alternatives under the union contract have always been available to Rodriguez and it is undisputed that he was aware of them. The Court must therefore conclude that Rodriguez simply decided not to take advantage of the options made available to him.

Rodriguez also contends that the transfer option provided for under the union contract is not applicable to this case because it "does not preempt his rights under Title VII or the [Police] Department's General Order 92-1." The City, however, has never contended that the union contract provisions "preempt" Rodriguez's claim. To the contrary, the City claims that the options offered by the union contract merely afford the means to satisfy Rodriguez's rights under Title VII. This Court agrees. The union contract

provisions are not being used by the City as an excuse or a "shield" to deny Rodriguez an accommodation for his religious beliefs. Instead, they have been properly raised as "reasonable accommodations" available to Rodriguez to alleviate his religious conflicts as required by Title VII. *See Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988) (provisions in collective bargaining agreement provided means for employee to eliminate her religious conflict while preserving her employment status).

Finally, Rodriguez argues that the option to transfer districts is not a "reasonable accommodation" because "he has no guarantee that he will not be compelled to some other abortion clinic detail under some other circumstance in the future." Specifically, Rodriguez postulates that a hospital or clinic in one of the districts he transfers to might decide, at some later date, to perform abortions and thus force him to "chase around the City from district to district." This Court is unwilling and unable to engage in the hypotheticals offered by Rodriguez. The Supreme Court has declared that a reasonable accommodation of an employee's religion is one that "eliminates the conflict between employment requirements and religious practices . . .." *Philbrook*, 479 U.S. at 70. The option to transfer to a district that does not have an abortion clinic detail eliminates Rodriguez's religious conflict for the foreseeable future and Rodriguez has presented the Court with no evidence to suggest otherwise.

CONCLUSION

For the reasons stated above, Rodriguez's motion for summary judgment is denied, and the City's motion for summary judgment is granted.

ENTER:

/S/
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: August 11, 1997

APPENDIX C

United States District Court
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN CIVIL CASE

RODRIGUEZ

-v-

CITY OF CHICAGO

CASE NUMBER: 95 C 5371

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED summary judgment is entered in favor of defendant City of Chicago and against plaintiff Rodriguez. This action is hereby dismissed in its entirety.

August 11, 1997
Date

Michael W. Dobbins
Clerk

/S/
(By) Deputy Clerk

APPENDIX D

In the
United States Court of Appeals
For the Seventh Circuit

No. 97-3339

ANGELO RODRIGUEZ,
Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 5371--George M. Marovich, Judge.

Argued April 22, 1998--Decided September 21, 1998

Before POSNER, Chief Judge, CUMMINGS and RIPPLE,Circuit Judges.

RIPPLE, Circuit Judge. On September 20, 1995, Angelo Rodriguez, a patrol officer in the Chicago Police Department ("CPD"), filed a four-count complaint against the City of Chicago. In that complaint, Officer Rodriguez alleged that the City discriminated against him on the basis of his religion by refusing to exempt him from an assignment to stand guard outside an abortion clinic on November 19, 1994. The only claim at issue in this appeal is Officer Rodriguez's contention that the City's refusal to exempt him from the clinic duty violated Title VII of the Civil Rights Act of 1964, 42

U.S.C. §§ 2000e-2000e-17.[1] On August 11, 1997, upon the parties' cross-motions for summary judgment, the district court granted the City's motion for summary judgment and denied Officer Rodriguez's motion. This appeal followed. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I
BACKGROUND

A. Facts[2]

Officer Rodriguez has served as a patrol officer in the CPD's 14th District since September 1980. Two abortion clinics are located in that district: (1) the Central Medico Pan American Clinic, located at 3412 West Fullerton Avenue ("the Fullerton Clinic") and (2) the American Women's Medical Center, located at 2744 North Western Avenue ("the Western Clinic"). Following a mass demonstration outside the Fullerton Clinic on October 23, 1993, the CPD began to assign one or more officers to stand guard outside the abortion clinics throughout the City. The CPD typically assigned officers to such "clinic duty" only on Saturday mornings. The officers assigned to clinic duty are instructed to establish a police presence outside the clinics by parking their squad cars in front of the clinics. The

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[1] In addition to his Title VII claim in Count I of his complaint, Officer Rodriguez also sought relief under the Municipal Code of the City of Chicago (Count II) and the Religious Freedom Restoration Act ("RFRA") (Count III) based on the same incident. In Count IV, Officer Rodriguez sought to enjoin the City from assigning him to clinic duty. On January 11, 1996, Officer Rodriguez's claim under the Municipal Code was dismissed by the district court pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cause of action. During the pendency of the parties' cross-motions for summary judgment, Count III of Officer Rodriguez's complaint was dismissed after the Supreme Court ruled RFRA unconstitutional in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Although it is less than clear from the record, it appears that Officer Rodriguez's claim for injunctive relief (Count IV) was dismissed after the district court granted summary judgment to the City on the Title VII claim.

[2] Unless otherwise noted, the facts in this case are undisputed.

purpose of the clinic duty is to protect the clinics' property and employees and to keep the peace.

When the clinic duty first began, the CPD would assign officers on the "First Watch"[3] to arrive at each clinic at about 5:00 a.m., until the "Second Watch" officers arrived shortly after the 7:00 a.m. morning roll call. Those officers would then stay until about 9:00-9:30 a.m., and check for the appearance of demonstrators. If none came, the CPD would cancel the detail and instruct the beat officers to pass by the clinics frequently and note if any demonstrators appeared. If any arrived, supervisors would send a relief officer to the detail at approximately 9:30-10:00 a.m. and at two and one-half hour intervals thereafter, until the last demonstrators left, usually around noon.

The clinic duty was activated regularly on Saturdays following the October 1993 demonstration at the Fullerton Clinic, although it was curtailed somewhat during the winter months. In August 1994, clinic assignments were increased in response to violence outside an abortion clinic in Pensacola, Florida. However, since November 1994, clinic assignments have been less frequent because of a lack of demonstrators, and the CPD activates the Saturday morning clinic duty only on an "as needed" basis.

Officer Rodriguez was among the officers assigned to the October 23, 1993 mass demonstration at the Fullerton Clinic and assisted in making arrests outside the clinic. However, while making arrests that day, he became unsettled about his role outside the clinic. As a life-long Roman Catholic, Officer Rodriguez accepts the teachings of the Roman Catholic Church that an elective abortion is the wrongful taking of innocent human life and that individuals have a general moral obligation to avoid participating in, or facilitating, an elective abortion. Subsequently, he was assigned to clinic duty on

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[3] The CPD divides its workday into three overlapping "watches": The First Watch works from approximately 11:00 p.m to 8:00 a.m.; the Second Watch from 7:00 a.m. to 4:00 p.m., and the Third Watch from 3:00 p.m. to midnight.

three occasions in the months following the demonstration. During that time, he became more and more convinced that his presence at the clinic facilitated the ongoing activities of the abortion clinic and, consequently, conflicted with his religious beliefs.

On January 29, 1994, Officer Rodriguez informed his watch commander, Captain William Guswiler, of his religious opposition to serving on clinic duty. Officer Rodriguez told Captain Guswiler that he had no objection to going to the clinic in an emergency situation but that he did not want to be assigned to the regular clinic duty. Captain Guswiler told Officer Rodriguez that he would try not to assign him to such duty; however, he could not give Officer Rodriguez a formal exemption from such work. For four months thereafter, Officer Rodriguez was not assigned to clinic duty.

In April 1994, Officer Rodriguez went on medical leave due to an injury. When he returned in September 1994, he again sought to ensure that he would not be assigned to clinic duty. Rather than rely on his informal arrangement with Captain Guswiler, Officer Rodriguez sent a memorandum to 14th District Commander Jose Velez in which he requested to be exempted from future assignments at abortion clinics because of his religious beliefs. After receiving Officer Rodriguez's missive, Commander Velez discussed Officer Rodriguez's request with Captain Guswiler and they agreed that Officer Rodriguez was not free to refuse an assignment, but that, when possible, Guswiler would continue to avoid assigning Officer Rodriguez to clinic duty. Commander Velez, however, never responded to Officer Rodriguez directly; nor did he inform anyone else of the request, because, in his view, CPD policy clearly prohibits an officer from refusing an assignment.

On November 19, 1994, Captain Guswiler decided to assign police personnel to one of the clinics because demonstrators were present. At approximately 11:35 a.m., the officer on duty at the clinic requested a replacement in order to take a "personal."[4]

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[4] Officers can take a "personal" for various reasons, such as to use a lavatory.

Sergeant Ronald Grimes assigned Rodriguez to replace the officer on clinic duty. After receiving the assignment, Officer Rodriguez promptly requested a "personal" and returned to the 14th District station. At the station, he told Sergeant Grimes that he objected to such work and informed him of his informal arrangement with Captain Guswiler. Sergeant Grimes responded, however, that Officer Rodriguez could not refuse the assignment. Officer Rodriguez then agreed to fulfill the assignment under protest. He was on clinic duty for approximately one-half hour before the watch was canceled for the remainder of the day. Since that incident, Officer Rodriguez has endeavored to avoid clinic duty by utilizing various options available to him, such as taking vacation time and obtaining out-of-district assignments on those days (Saturdays) on which the clinic duty is most likely to be activated. According to the record before us, he has not been assigned to any further clinic duty since this incident.

B. Proceedings in the District Court

On September 20, 1995, Officer Rodriguez initiated the present action against the City asserting four claims: (1) Count I alleged that the City discriminated against him on the basis of his religion by refusing his request to be exempted from clinic duty in violation of Title VII of the 1964 Civil Rights Act; (2) Count II alleged religious discrimination under the Municipal Code of the City of Chicago based on the same incident; (3) Count III alleged a violation of religious liberty under the Religious Freedom Restoration Act ("RFRA") for the same incident; and (4) Count IV sought an injunction prohibiting the CPD from assigning Officer Rodriguez to clinic duty. At various stages in the proceedings, the district court dismissed Officer Rodriguez's claims under the Municipal Code and RFRA,[5] leaving only his Title VII claim and his request for injunc-

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[5] *See supra* note 1.

tive relief. The parties then filed cross-motions for summary judgment on the Title VII claim.

The district court granted the City's motion for summary judgment and denied Officer Rodriguez's. The court began its analysis of Officer Rodriguez's Title VII claim by noting that the City had conceded that Officer Rodriguez had established a prima facie case of religious discrimination. At that point, the burden shifted to the City to show that it had made a reasonable accommodation of Rodriguez's religious beliefs or that any accommodation would result in undue hardship. The district court held that various options were available to Officer Rodriguez under the existing collective bargaining agreement[6] ("CBA") by which he could avoid the conflict between his job assignments and religious beliefs and that, accordingly, the City has satisfied its duty to accommodate him. In particular, the court found that, under the CBA, Officer Rodriguez could have requested transfer to six alternative districts on the north side comparable to the 14th District that did not have facilities where abortions were performed. Due to his seniority, Rodriguez would have been able to make the change with no reduction in his level of pay or benefits. In addition, there existed several other options available to Officer Rodriguez by which he could have avoided clinic duty such as applying for "special function assignments," changing his shift, changing his start time, using time due and using unpaid leave. In this regard, the court noted that Officer Rodriguez had been able to avoid clinic duty since November 1994 by taking advantage of those options.

II
DISCUSSION

A. Standard of Review

We review de novo the district court's grant of summary judgment. *See Talanda v. KFC Nat'l Management Co.*, 140 F.3d

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[6] At all relevant times, Officer Rodriguez was covered by a CBA between the City and the Fraternal Order of Police Local Lodge No. 7.

1090, 1095 (7th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3093 (U.S. July 2, 1998) (No. 98-37). Like the district court, we review the record in the light most favorable to the nonmoving party, Officer Rodriguez, and draw all reasonable inferences in his favor. *See Vanasco v. National-Louis Univ.*, 137 F.3d 962, 965 (7th Cir. 1998). "We shall uphold a grant of summary judgment only when 'the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'" *Larimer v. Dayton Hudson Corp.*, 137 F.3d 497, 500 (7th Cir. 1998) (quoting Fed. R. Civ. P. 56(c)).

B. Officer Rodriguez's Title VII Claim

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion, in turn, includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business. Accordingly, we turn first to the issue of whether the City has satisfied its duty of reasonable accommodation; only if we answer that question in the negative need we proceed to the "undue hardship" prong of the Title VII analysis.

A reasonable accommodation of an employee's religion is one that "eliminates the conflict between employment requirements and religious practices." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986). The district court concluded that the City had satisfied its duty to accommodate Officer Rodriguez by providing

him the opportunity, through the CBA, to transfer to a district that did not have an abortion clinic with no reduction in his level of pay or benefits. We agree. It is undisputed that, under the terms of the CBA, Officer Rodriguez could transfer to a district comparable to the 14th District but without abortion clinics. Such a transfer would eliminate the conflict between Officer Rodriguez's religious beliefs and his job duties and he would suffer no reduction in pay or benefits as a result of such a transfer. Accordingly, a transfer under the terms of the CBA is "a paradigm of 'reasonable accommodation.'" *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994).

Indeed, in *Wright*, we encountered facts similar to those before us today. In that case, the plaintiff Wright, a Seventh Day Adventist, observed the Sabbath from sundown Friday until sundown Saturday and was required to refrain from any employment activities during that time. Wright was an employee of the United States Postal Service ("USPS"). *See id.* at 215. For several years, Wright held a box sorter position at the Milwaukee Post Office, which did not require him to work on his Sabbath. However, in April 1987, Wright received a letter from the post office notifying him that his position was being eliminated but that, because of this job elimination, he would have the opportunity to bid for a new position in a special bidding procedure. Although none of the positions offered in the special bidding procedure accommodated Wright's religious practices, he had the opportunity through the regular bidding procedure to bid on four other positions that did not require him to work on his Sabbath. *See id.* at 216. Due to his seniority, Wright would have received at least two of those positions had he bid for them. As a consequence of his failure to bid on either position, Wright was placed in a job that required him to work on Friday night. After his supervisor rejected his request to take Friday nights off, Wright resigned.

We rejected Wright's contention that the USPS's actions violated its duty under Title VII to accommodate his religious practices. Instead, we held that the USPS satisfied its duty to

accommodate Wright by allowing him to select, through the bidding system, a position the requirements of which did not interfere with his religious practices. *See id.* at 217. By refusing to exercise that option, it was Wright, not his employer, who was responsible for the conflict. See id. Moreover, in reaching that conclusion, we stressed that Wright was not entitled to the accommodation of his choosing--"Title VII . . . requires only 'reasonable accommodation,' not satisfaction of an employee's every desire." *Id.* Accordingly, the fact that Wright had to give up his option to bid on other jobs he found preferable did not make the bidding system any less of a reasonable accommodation.

Similarly, in the case before us today, the fact that Officer Rodriguez may prefer an accommodation that allows him to remain in the 14th District does not render a transfer "unreasonable." Like the jobs available to Wright through the bidding process, a transfer to another district without an abortion clinic is eminently reasonable because it will allow Officer Rodriguez to eliminate the conflict between his job and religious beliefs without a reduction in pay or benefits. The fact that the City cannot force Officer Rodriguez to transfer to a district without abortion clinics, just as the USPS could not force Wright to bid on the position which did not require him to work on his Sabbath, does not mean that providing him the option to do so is an unreasonable accommodation.

Furthermore, the EEOC and several other circuit courts of appeal have concluded, as we did in *Wright*, that it is a reasonable accommodation to permit an employee to exercise the right to seek job transfers or shift changes, particularly when such changes do not reduce pay or cause loss of benefits. *See* 29 C.F.R. § 1605.2(d)(1)(iii); *see also Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241-42 (9th Cir. 1990) (holding that employer satisfied duty of reasonable accommodation by providing employee with the option of transfer to a different shift which would not conflict with employee's observation of Saturday Sabbath; new position had lower hourly wage but employee's gross wages were higher because position offered more hours); *Hudson v. Western Airlines, Inc.*, 851

F.2d 261, 265-67 (9th Cir. 1988) (holding that various options available to employee under collective bargaining agreement, which allowed employees to adjust their schedules to accommodate personal desires and preferences including religious observances, satisfied employer's duty of reasonable accommodation); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145 (5th Cir. 1982) (holding that employer satisfied duty of reasonable accommodation by means of flexible scheduling system and by providing employees with opportunity to trade days off); *United States v. City of Albuquerque*, 545 F.2d 110, 113-14 (10th Cir. 1976) (holding that City's fire department satisfied duty of reasonable accommodation by providing employees with several options to avoid working a particular shift, including trading shifts with another fireman), *cert. denied*, 433 U.S. 909 (1977).[7]

Despite the fact that he acknowledges that a transfer to a different district pursuant to the CBA would eliminate the conflict between his job responsibilities and his religious beliefs, Officer Rodriguez nonetheless asserts that the district court erred in holding

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[7] In reaching the conclusion we reach today, we emphasize that an employer will not always be able to provide an employee with reasonable accommodation through the provisions of a CBA. The determination of whether an accommodation is reasonable in a particular case must be made in the context of the unique facts and circumstances of that case. *See Redmond v. GAF Corp.*, 574 F.2d 897, 902-03 (7th Cir. 1978). If the transfer or job-swapping options available to all employees under a CBA would not eliminate the particular employee's religious conflict, "the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's religious beliefs without incurring undue hardship." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988). For example, in *Smith*, the Sixth Circuit held that a CBA's provision permitting employees to trade days off with other employees did not provide reasonable accommodation to an employee who had a religious objection to seeking such a trade because, in his view, it was also morally wrong to induce another to work in his stead on the Sabbath. *See id.* at 1088. In this case, however, it is clear that a transfer to a different district under the terms of the CBA would resolve the conflict between Officer Rodriguez's job responsibilities and his religious beliefs.

that the CBA provided reasonable accommodation to him for three reasons: (1) He asserts that the City should have accommodated him by exempting him from clinic duty thereby allowing him to stay in the 14th District; (2) he asserts that an accommodation requiring him to transfer to another district is not reasonable because it would require him to forfeit his right under the CBA to remain in the district of his choice; (3) he maintains the City should not be allowed to fulfill its duty of reasonable accommodation by ignoring his request for accommodation and forcing him to invoke his transfer options if he wishes to avoid the duty.

Officer Rodriguez first contends that the City would not suffer undue hardship by accommodating him within the 14th District. "Title VII, however, requires only 'reasonable accommodation,' not satisfaction of an employee's every desire." *Wright*, 2 F.3d at 217. Indeed, in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), the Supreme Court held that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Id.* at 68. In this case, we have concluded that a transfer under the terms of the CBA would eliminate Officer Rodriguez's religious conflict; accordingly, we need not consider whether the City would have suffered an undue hardship by accommodating Officer Rodriguez within the 14th District. By providing at least one reasonable accommodation, the City discharged its obligation under Title VII. *See id.* at 69; *Wright*, 2 F.3d at 217.

Officer Rodriguez next asserts that an accommodation requiring him to transfer to another district is not reasonable because it would require him to forfeit his right under the CBA to remain in the district of his choice. In making this contention, Officer Rodriguez invites our attention to Section 10.2 of the CBA which provides as follows:

> The Employer shall not discriminate against officers, and employment-related decisions will be based on qualifications and predicted performance in a given position without

> regard to race, color, sex, religion, age (40-63), or national origin of the officers as a result of membership in the Lodge. Nothing contained in this Agreement shall be deemed to preclude the mandatory retirement of any officer upon or after the attainment of age 63. Officers shall not be transferred[,] assigned or reassigned for reasons prohibited by this Section 10.2.

Officer Rodriguez contends that this provision entitles him to stay in the shift and district of his choice and that the City's proposed accommodation would therefore violate this provision by requiring him to transfer to a different district because of his religion. We cannot accept Officer Rodriguez's interpretation of Section 10.2 of the CBA. Section 10.2 clearly delineates that the City may not force Officer Rodriguez to transfer to another district because of his religion; it does not foreclose the City from offering him a transfer as a reasonable accommodation of his religious beliefs.

Officer Rodriguez's final contention is that the City failed in its duty to open a dialogue with Officer Rodriguez on the question of reasonable accommodation. In particular, he points to Commander Velez's failure to make any response to his formal request for accommodation. *See, e.g., Philbrook*, 479 U.S. at 69 (noting that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business" (internal quotations omitted)); *Redmond v. GAF Corp.*, 574 F.2d 897, 902 (7th Cir. 1978) (same). Although Commander Velez's failure to respond to Officer Rodriguez's formal request gives us some pause, we conclude that the City satisfied its duty in this regard by engaging in the collective bargaining process with Officer Rodriguez's union. As a result of that dialogue, the City and the union agreed to provide certain police officers the option to transfer districts for whatever reason without a diminution in their pay or benefits. This understanding was reflected in the CBA, and Officer Rodriguez was aware that the CBA provided him with this option. Under these circumstances, we cannot say that Officer Rodriguez was prejudiced by Commander

Velez's failure to respond to his formal request for an exemption from clinic duty; nor can we say that Velez's failure to respond resulted in a substantive violation of Title VII.[8]

Conclusion

Because the CBA provided Officer Rodriguez with the option of transferring to a district without an abortion clinic and such a transfer would have eliminated the conflict between his job responsibilities and his religious beliefs, we conclude that the City has satisfied its duty of reasonable accommodation under Title VII[9]. The judgment of the district court is therefore affirmed.

AFFIRMED

Posner, Chief Judge, concurring. It is a matter of judgment whether to base the decision of an appeal on a broad ground, on a narrow ground, or on both, when both types of ground are available.

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[8] We also cannot accept Officer Rodriguez's assertion that the City is barred from invoking the provisions of the CBA as a reasonable accommodation under generally recognized principles of estoppel and waiver. Officer Rodriguez bases this contention primarily on the Tenth Circuit's holding in *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990). In Toledo, the employer argued that it had satisfied its duty of reasonable accommodation by virtue of a settlement offer it had made to the employee after the initiation of litigation. The Tenth Circuit rejected this argument, holding that the employer could not exonerate itself by relying upon attempts at accommodation after the employee has already suffered some detriment due to the conflict between his religion and his job. *See id.* at 1488. In this case, however, the accommodations available to Rodriguez through the CBA were available prior to his assignment to clinic duty on November 19, 1994 and prior to the initiation of this litigation. Moreover, it is undisputed that Officer Rodriguez was aware of his options under the CBA.

[9] Because we have concluded that the City satisfied its duty of reasonable accommodation under Title VII by providing Officer Rodriguez the option to transfer to a different district, we need not reach the "undue hardship" portion of the Title VII analysis.

If the judges are dubious about the broad ground, then they will do well to decide only on the narrow ground; but if they are confident of the broad ground, they should base decision on that ground (as well as on the narrow ground, if equally confident of it) in order to maximize the value of the decision in guiding the behavior of persons seeking to comply with the law. One of the most important things that appellate courts do is to formulate rules of law. They would formulate very few rules, and leave the law in a state of considerable and avoidable uncertainty, if they always chose to decide a case on the narrowest possible ground. It is true that the broader the ground, the more likely it is to sweep in cases that the judges cannot perfectly foresee, and this argues for caution in deciding cases on broad grounds, because there is greater risk of error, and for a willingness to carve exceptions as new cases imperfectly foreseen arise. But I think that we could prudently have gone further in this case than the majority opinion does to clarify the law governing the duty of public-safety agencies to accommodate the religious beliefs of their employees, rather than leave the law in a state of uncertainty which the majority opinion may actually increase.

The ground on which my colleagues have based decision is narrow--that the city made a reasonable effort to accommodate Officer Rodriguez's religious beliefs. It is convincing, but we would be doing a big favor for the bench and bar of this circuit, and for its police and fire departments, and with little risk of error, if we made clear that police officers and firefighters have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons. Mr. Rodriguez, a Chicago police officer, claims, I have no reason to doubt sincerely, that it violates his religious principles to guard abortion clinics. He is entitled to his view. He is not entitled to demand that his police duties be altered to conform to his view any more than a volunteer member of the armed forces is entitled to demand that he be excused from performing military duties that conflict with his religious faith (I specify

"volunteer" because the claim of a conscripted soldier is stronger, *see Welsh v. United States*, 398 U.S. 333, 344 (1970); *United States v. Seeger*, 380 U.S. 163, 185-87 (1965)), or than a firefighter is entitled to demand that he be entitled to refuse to fight fires in the places of worship of religious sects that he regards as Satanic. The objection to recusal in all of these cases is not the inconvenience to the police department, the armed forces, or the fire department, as the case may be, though that might be considerable in some instances. The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect.

The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty-- that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.

All that an employer must show to avoid liability for religious discrimination in employment is that "he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). The Chicago Police Department reasonably accommodated Rodriguez by allowing him to use his accumulated seniority to transfer to a district that does not have an abortion clinic in it. The only inconvenience to Rodriguez is that he would miss the "camaraderie" of the Fourteenth District. This is a trivial inconvenience. But I do not think that the Department was required to accommodate Rodriguez's religious aversion to protecting abortion clinics even to the limited

extent that it did. The importance of public confidence in the neutrality of its protectors is so great that a police department or fire department or equivalent public-safety agency that decides not to allow recusal by its employees should be able to plead "undue hardship" and thus escape any duty of accommodation. *Ryan v. Department of Justice*, 950 F.2d 458, 462 (7th Cir. 1991); *Beadle v. City of Tampa*, 42 F.3d 633, 637-38 (11th Cir. 1995); *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976); *cf. Jones v. City of Gary*, 57 F.3d 1435, 1442 (7th Cir. 1995).

Both *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986), and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), hold that anything more than a *de minimis* cost to the employer is undue hardship within the meaning of Title VII. It is undue hardship in spades when the necessary accommodation would strike a body blow to the employer's business. When the business of the employer is to protect the public safety, the maintenance of public confidence in the neutrality of the protectors is central to effective performance, and the erosion of that confidence by recognition of a right of recusal by public-safety officers so undermines the agency's effective performance as to constitute an undue hardship within the meaning of the statute. Although the principle that public-safety officers have no right to pick and choose on religious or other personal grounds among the people whom they protect applies to all police officers employed by any public police force, including the U.S. Marshals Service, the FBI, and the Secret Service, and to all firefighters employed by public fire departments, I would reserve the case we put at argument, of a fire department paramedic who refuses on religious grounds to obey an order by his superiors to withdraw life support from a patient. That would be a case of a public-safety officer insisting on protecting all members of the public rather than refusing to protect some of them. It would thus be a different case from the present one and we need not decide today how it ought to be decided.

Our decision in *Ryan*, which upheld the discharge of an FBI agent who refused on religious grounds to investigate antiwar

activists, comes so close to enunciating the principle that I am urging that the failure of the majority opinion even to cite that case may be taken as expressing doubts about the validity of the principle. I hope not, but it is another reason why deciding this case on the broader ground would serve to dispel uncertainty.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: September 21, 1998

BEFORE: Honorable RICHARD A. POSNER, Chief Judge
Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

No. 97-3339

ANGELO RODRIGUEZ,
Plaintiff - Appellant

v.

CITY OF CHICAGO,
a municipal corporation,
Defendant - Appellee

Appeal from the United States District Court for the
Northern district of Illinois, Eastern Division
No. 95 C 5371, George M. Marovich, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

Supreme Court, U.S.
FILED
JAN 20 1999
CLERK

(2)

No. 98-1005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANGELO RODRIGUEZ,

Petitioner,

v.

THE CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the City of Chicago reasonably accommodated the religious beliefs of a police officer who objected to assignments that required him to provide protective services at abortion clinics when its collective bargaining agreement with the officer's union entitled the officer to change his assignment or shift so that he would not have to perform the duties to which he had religious objections.

2. Whether the City of Chicago can be held liable for failing to accommodate the religious objection of a police officer to assignments that required him to provide protective services at abortion clinics even if a collective bargaining agreement offered that officer a reasonable accommodation of which the officer was aware, merely because the City failed to remind the officer of his right to avail himself of the applicable provisions of the collective bargaining agreement when the officer requested that he be exempted from such assignments.

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STATEMENT

At all times relevant to this lawsuit, petitioner Angelo Rodriguez was employed by the Chicago Police Department as a patrol officer assigned to the second watch in the 14th District. R. 52, ¶ 3.[1] There are two medical clinics within the 14th District that provide medical services to women seeking abortions. *Id.* ¶ 13. The clinics are located in the beat adjacent to the one to which petitioner was routinely assigned. R. 45, ¶ 19.[2] Since at least September 1991, the Police Department has from time to time assigned officers to the clinics because of the risk of violence and potential interference with a lawful business. R. 52, ¶¶ 12, 27. The purpose of the clinic assignments is to enforce the law and protect individuals and property. *Id.* ¶ 23.

Assignments to the clinics were made fairly regularly after an October 23, 1993 demonstration at one of the district's clinics, although they were less frequent during the winter. R. 52, ¶ 22. They were stepped up again in approximately August 1994 in response to violence at a clinic in Pensacola, Florida, and a request from demonstrators on both sides of the abortion issue. *Id.* ¶¶ 23-25. Since approximately November 1994, abortion clinic assignments have been infrequent because of the lack of demonstrators. *Id.* ¶ 29. Assignments are made

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[1] The Chicago Police Department has three watches. R. 52, ¶ 14.

[2] Under the Chicago Alternative Policing Strategy ("CAPS"), which became fully effective in January 1995, ordinarily only officers assigned to the beats in which abortion clinics are located, and officers from nearby beats, are assigned to clinic duty. R. 52, ¶¶ 53, 58-60.

only in special circumstances or if a clinic calls for assistance. *Id.* ¶ 30.

As petitioner testified, clinic assignments are pretty much exclusively made on Saturdays and are "always," in his experience, over by noon. R. 52 at Exh. J at 92. Like other assignments, clinic duty was assigned either at the station by the watch commander during roll call or by radio dispatch to an officer in the field. R. 52, ¶ 21. In general, the detail would run from 7:30 a.m. until noon, with each officer performing a 2.5 hour shift. *Id.* ¶ 20, 26. The detail was broken up this way because officers considered it a boring assignment. *Id.* ¶¶ 19, 20.

During most of the time relevant to this lawsuit, an officer on the first watch, 11:00 p.m. until 7:00 a.m., was sent to the clinic at approximately 5:00 or 6:00 a.m. to monitor for protestors. R. 52, ¶ 14. An officer from the second watch, 7:00 a.m. until 3:00 p.m., would relieve the first watch operator. *Id.* If no protestors were present, the assignment was cancelled at approximately 9:00 a.m. or 9:30 a.m. *Id.* ¶ 15. If one or more protestors were present, one police officer was assigned to the clinic to make the police presence prominent and to keep the peace. *Id.* ¶¶ 15, 16; *id.* at Exh. K at 11-12. More officers were sent if a group of protestors appeared. R. 52, ¶ 17. Clinic coverage varied from month to month and season to season, with demonstrations being less frequent in the winter. *Id.* ¶¶ 18, 22; R. 52 at Exh. J at 118.

Petitioner has been assigned a total of three times to duty at the clinics, and on one of those occasions he volunteered. R. 52, ¶¶ 31-34. In January 1994, after the

first two assignments, petitioner told his watch commander, Captain William Guswiler, that he did not want to be assigned to the clinics except in emergencies because such duty conflicted with his Roman Catholic beliefs. *Id.* ¶¶ 4, 35. Capt. Guswiler told petitioner that he could not exempt him from any assignment but that he would try not to assign him to the clinics. *Id.* ¶ 35.

From April to September 1994, petitioner was on medical leave. R. 52, ¶¶ 9, 22, 36-37. After petitioner's return from leave, on October 7, 1994, he submitted a memorandum to Capt. Guswiler formally seeking an exemption from clinic duty due to his Roman Catholic beliefs. R. 52, ¶ 38. Petitioner submitted the memo because he knew that Capt. Guswiler was not going to be able to honor their arrangement permanently. R. 45, ¶ 76. Guswiler forwarded the memorandum to 14th District Commander Jose Velez. R. 52, ¶¶ 4, 38. The next day, Cmdr. Velez spoke with Capt. Guswiler about petitioner's request. *Id.* ¶ 40. The two agreed that petitioner could not refuse an assignment, but, depending upon operational need, Capt. Guswiler could try to avoid assigning petitioner to the clinic. *Id.* at Exh. K at 58; R. 45, ¶ 100. Cmdr. Velez never responded to petitioner directly, nor did he inform any one else of petitioner's request, because Department policy is clear that an officer cannot refuse an assignment. R. 52, ¶ 41-42.

On November 19, 1994, Capt. Guswiler decided to assign police personnel to one of the clinics because demonstrators were present. R. 52, ¶ 44. At approximately 11:35 a.m., the officer on duty at the clinic requested replacement. *Id.* ¶ 46. Officers can request a

replacement for various reasons, such as to use the bathroom. *Id.* Petitioner was assigned by dispatch to the clinic. *Id.* Before going to the clinic, petitioner returned to the station house and asked his immediate supervisor, Sgt. Ronald Grimes, to be exempted from clinic duty. *Id.* ¶ 47. Sgt. Grimes denied the request. *Id.* Petitioner then spent approximately one-half hour outside the clinic. *Id.* ¶ 46.

According to petitioner, he is willing to respond to emergencies at the clinics but is unwilling to perform any duty there when the situation is peaceful. R. 52, ¶¶ 48-49. At his deposition, petitioner could not define what would constitute an "emergency" to which he would be willing to respond. *Id.* ¶ 50; *id.* at Exh. J at 127-51, 173-96. At one point he defined emergencies as "Priority One" assignments, but the Police Department already considers clinic assignments to be "Priority One." R. 52, ¶¶ 51-52, 56. Petitioner also maintains that he must be permitted to decide upon arrival at the clinic whether his assignment is actually an emergency. *Id.* ¶ 57. As a result, he does not believe he should have to take assignments for civil disturbances or even "mass civil disorder" at a clinic. *Id.* at Exh. J at 127-29.

The record reflects the logistical difficulties police dispatching would face if they were required to honor a patrol officer's request to be exempted from particular assignments. In winter months, the Communications Section, which is in charge of dispatching assignments to officers in the field, receives an average of 9,000-10,000 calls a day. R. 52, ¶ 63. During the spring, summer, and early fall, volume increases to an average of 14,000-15,000 calls a day. *Id.* Radio on-air time is kept

to a minimum because of the high call volume. *Id.* ¶ 73. In fact, air time "is very valuable. Air time is a police safety issue and it's a public safety issue and it's a police efficiency issue." R. 60 at Exh. C at 105. Dispatchers use several computer screens showing all pending events to which they need to assign officers and all events that have been assigned. R. 52, ¶ 66. The computer might show only the address of the incident, not what type of business is located at the address. *Id.* ¶ 70. Dispatch knows only the beat car number and whether it is a one- or two-person car. *Id.* ¶ 67. Dispatch does not know the identity of the officers in the cars, nor does it have the capacity to code a beat car for some special designation. *Id.* ¶¶ 67-68, 70. Not infrequently, in the 14th District there will be only one car (or no cars) available to accept assignments at particular times. *Id.* ¶ 61. A shortage of available cars, may create a problem in providing police services. *Id.* ¶ 62; R. 54, ¶ 62.

Dispatchers operate on the assumption that any on-duty officer not on assignment is available for assignment. R. 60, ¶ 178. Officers cannot refuse an assignment from dispatch except in limited circumstances. R. 52, ¶ 54. The decision of the dispatcher is considered final, unless altered by the field lieutenant or supervising sergeant. *Id.* ¶ 55. Consequently, if an officer informed the dispatcher that he could not handle a particular assignment because of his religious beliefs, the dispatcher would have to contact the officer's supervisor to verify the exemption. *Id.* ¶¶ 74, 76, 78. This, in turn, would disrupt and delay service and tie up the air waves with three-way negotiations among the officer, the officer's supervisor, and dispatch. *Id.* ¶¶ 75, 77; see

also *id.* at Exh. I (testimony of Commander of Communications Jerry Robinson).

At all relevant times, petitioner was covered by a collective bargaining agreement ("CBA") between the City and the Fraternal Order of Police Local Lodge No. 7. R. 52, ¶ 6. Under section 23-8 of the CBA, officers may bid to transfer between districts. *Id.* ¶ 83. Bids are granted based upon seniority. *Id.* Petitioner was aware of his right to bid and knows that vacancies are posted in the roll call room. *Id.* ¶ 88. Petitioner's pay and benefits would not be affected by a transfer. *Id.* ¶ 89.

There were several districts closer to petitioner's home than the 14th District that do not have within them any facilities at which abortions are performed; these other districts are considered comparable to or more desirable districts than the 14th. R. 52, ¶¶ 84-86. Petitioner had enough seniority to bid to six different comparable or more desirable districts and obtain (except perhaps in one of the districts) the same shift he currently works. R. 52, ¶ 87.

Petitioner also had other options available to him under the CBA that would enable him to avoid assignments at abortion clinics and yet stay in the 14th District. He admitted that he had enough seniority to work on the third watch, which begins at 3:00 or 4:00 p.m., after clinic assignments have ended. R. 52, ¶ 91; *id.* at Exh. J at 73. The Department also has special function assignments that do not involve patrol work. R. 54, ¶ 92. Alternatively, petitioner could remain in the 14th District even on the second watch, because with his seniority, petitioner could also use a combination of vacation days, "baby furlough" days, personal days, and

his compensatory time to avoid working every Saturday in the course of the year. R. 52, ¶¶ 93-95; see also R. 52 at Exh. L at 39-40; R. 54, ¶ 93-95.[3] Petitioner does not have to give any reason for requesting time off, and has, within the last few years, never been denied a request to use his compensatory time or to take a day off. R. 52, ¶¶ 95-96; *id.* at Exh. J at 252. Petitioner believes that he has enough seniority to utilize his benefit days whenever he likes. R. 52, ¶ 96. He also has the option of taking time off without pay. *Id.* ¶ 97; R. 54, ¶ 97.

On September 20, 1995, petitioner filed a four-count complaint against the City of Chicago alleging that the City had discriminated against him on the basis of his religion by refusing to exempt him from assignments requiring him to maintain the peace outside of abortion clinics. R. 1. In count I, he alleged religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2. R. 1 at 13-14. Count II alleged religious discrimination in violation of the Municipal Code of the City of Chicago. *Id.* at 14-15. Count III alleged a violation of his right to free exercise of religion under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) ("RFRA"). *Id.* at 15-16. Count IV was a request for an injunction prohibiting the Police Department from detailing him to regular assignments for general peace keeping activity outside of abortion clinics. *Id.* at 16.

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[3] Petitioner is entitled to five weeks of vacation annually, four of which he must use in two-week blocks. R. 52, ¶ 95.

The City first brought a motion to dismiss the complaint. R. 9, 10, 11. The court granted the motion with respect to count II, the alleged violation of the Municipal Code, because petitioner had failed to exhaust his administrative remedies. R. 23. The balance of the motion was denied. *Id.* The parties subsequently filed cross-motions for summary judgment. R. 43-46, 52-54, 59-61, 74. During briefing, this Court struck down RFRA as unconstitutional, and the district court then dismissed count III of the complaint. Pet. App. 13a. On August 11, 1997, the district court granted the City's motion for summary judgment and denied petitioner's motion. Pet. App. 18a. The court "conclude[d] that reasonable accommodations were available to [petitioner] that would have eliminated his religious conflict." Pet. App. 16a. On September 21, 1998, the court of appeals affirmed that judgment. Pet. App. 32a.

ARGUMENT

Under Title VII of the Civil Rights Act, an employer must offer a reasonable accommodation of an employee's religious beliefs. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). See also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986). Here, the City accommodated petitioner's religious objection to providing police service at abortion clinics, since the CBA that governed petitioner's employment contains a number of measures by which petitioner could have avoided assignments to clinics. In fact, petitioner successfully avoided clinic duty after November 19, 1994, by utilizing many of these measures. Petitioner was fully aware prior to November 19, the only occa-

sion on which he was assigned to clinic duty after registering his religious objection, that he had not been granted an exemption from such duty and that he could utilize his contractual rights to avoid future clinic assignments. It is quite settled that an employee's failure to utilize the reasonable accommodations already made available to him ends his case. See *Philbrook*, 479 U.S. at 68-69. That undisputed proposition establishes that the judgment below was correct. Because that judgment does no more than apply settled law, and is consistent with the law in all other circuits, plenary review is not warranted here.

1. "Any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Philbrook*, 479 U.S. at 68. Petitioner has never disputed that he knew of the numerous options available to him under the CBA by which he could avoid clinic duty. The CBA provided him the right, for whatever reason he desired, to take days off, obtain special duty assignments, change the hours of his shift, or transfer to a district in which no abortion clinic was located. See R. 52, ¶¶ 83-97. The court of appeals correctly observed: "It is undisputed that, under the terms of the CBA, [petitioner] could transfer to a district comparable to the 14th District but without abortion clinics." Pet. App. 27a. And short of a transfer, petitioner could have elected to work shifts and assignments during which no abortion clinic duty would be necessary. Petitioner's successful use of these measures to avoid clinic duty after his November 19, 1994 clinic assignment illustrates that these measures do in fact provide him with an effective means to avoid the assignment to which he has a religious objection.

Quite settled law makes plain the correctness of the judgment below. Title VII requires an employer to provide only one reasonable option that eliminates any conflict between the employee's religious beliefs and his duties. See, *e.g.*, *Philbrook*, 479 U.S. at 68-69. That accommodation need not be one that the employer prefers. See *id.* at 68-70. Petitioner may have preferred an exemption from clinic duty to the use of his CBA rights, but that does not mean that the City was obligated to provide him with that option.

Petitioner offers only one reason why the CBA did not constitute a reasonable accommodation within the meaning of Title VII. He argues that an employer cannot "satisfy its affirmative obligation to accommodate an employee's beliefs under Title VII by requiring the employee to forfeit *his own* CBA rights." Pet. 8 (emphasis in original). Yet nothing in the opinions below suggests that an employee can be compelled to "forfeit" a contractual right. Petitioner in fact has not been required to "forfeit" any right he has under the CBA. The CBA gives him the right to choose either to stay in the 14th District or to transfer districts. It also gives him the right to change shifts, seek special duty assignments, or take days off to which he is entitled. If he chooses to transfer districts, take particular days off, or seek special assignments for religious or any other reasons, he is not forfeiting any right he has under the CBA, but rather he is exercising such a right. And, as the court of appeals correctly observed, while under the CBA the City cannot require petitioner to transfer to another district, "it does not foreclose the City from offering him a transfer as a reasonable accommodation of his religious beliefs." Pet. App. 31a.

For his part, petitioner does not claim that he will be burdened in any meaningful way if he does in fact exercise his contractual rights in order to resolve the asserted conflict between his job and his religious beliefs. To the contrary, as the district court observed, petitioner "grudgingly concede[d] that he has no specific objection to transferring districts." Pet. App. 15a.[4] Nor has petitioner claimed that transferring shifts, using days off, or taking special duty assignments on occasions on which abortion clinic duty might otherwise be necessary would impose any special hardship or difficulty on him. Petitioner, for example, testified that clinic duty was always on Saturday and that, in the last few years, he had never been denied a requested Saturday off. See R. 52, ¶ 96; *id.* at Exh. J at 91. And as we observe above, petitioner in fact successfully availed himself of various rights under the CBA to avoid clinic duty after his November 19, 1994 assignment.

All other circuits to consider the question have concluded that when an employee can accommodate his religious beliefs by exercising a right to seek job transfers or shift changes, he has received a reasonable accommodation, particularly when these changes do not involve any reduction in pay, benefits, or adversely affect an employee's working conditions. See, *e.g.*, *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990); *Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 266-67 (9th Cir. 1988); *Getz v. Pennsylvania Depart-*

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[4] In fact, at his deposition petitioner testified that for various personal reasons, a transfer to another district "would probably be better for me." R. 52, at Exh. J at 281-82.

ment of Public Welfare, 802 F.2d 72, 73 (3d Cir. 1986); *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985); *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), cert. denied, 433 U.S. 909 (1977); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 519-20 (6th Cir. 1975). See also 29 C.F.R. § 1605.2(d)(1)(iii) (1995).[5]

Petitioner claims that the law in the Sixth Circuit is inconsistent with the decision below. See Pet. 9 & n.19. In fact, the two decisions of that circuit on which petitioner relies can readily be harmonized with the holding below. In *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994), the court observed only that the proffered accommodation would not have been a reasonable one because the employee would have been required to use all of his accrued vacation time. See *id.* at 1379. Here, there were at least two accommodations available to petitioner that would not have required him to use any of his vacation time; even if he opted to use some of his vacation time, there was no need for petitioner to use all or even the majority of his vacation time in order to avoid clinic assignments (which were only on Saturdays); and, indeed there is not even a claim here that an accommodation dependent on the use of some of petitioner's vacation time would have been unreasonable. Moreover, the statement in *Cooper* on which petitioner relies was merely dictum, since the

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[5] Indeed, petitioner acknowledges that the law in many circuits is contrary to his position. See Pet. 9 & n.18.

court went on to hold that the accommodation the employee desired was not "reasonable," and hence was not statutorily required. See *id.* at 1380. In *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), cert. denied, 485 U.S. 989 (1988), the court held that a CBA term permitting employees to trade days off did not provide a reasonable accommodation because the employee had a religious objection to asking other employees to work on the Sabbath in his stead. See *id.* at 1088. Here, of course, the CBA does not require petitioner to ask anyone to work in his stead. Indeed, the Seventh Circuit distinguished *Smith* in the decision below on just that ground. See Pet. App. 29a.[6]

Accordingly, in the decision below the court of appeals did no more than apply settled law in a manner consistent with the holdings in all other circuits to have reached the question. Petitioner cannot identify any circuit in which an employee's ability to exercise contractual rights is not considered a means by which an employer can discharge its obligation to provide a reasonable accommodation. Nor does he advance any reason of logic or policy why an employer should be precluded from relying on the "accommodations" employees receive through collective bargaining in order to discharge its statutory obligations under Title VII.

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[6] Petitioner also cites *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448 (W.D. Mich. 1986), appeal dismissed, 815 F.2d 76 (6th Cir. 1987), but in that case the employer did not provide any reasonable accommodation until after it had already disciplined the employee for taking time off for religious reasons. See *id.* at 1453-54.

2. Petitioner also argues that the City failed to discharge its obligations under Title VII because he received no response from his district commander to his written request for an exemption from clinic duty. Petitioner notes that "an employer can be found liable under Title VII for rebuffing an employee's request for accommodation and making 'no effort' to provide it." Pet. 15. As the court of appeals correctly observed, however, this principle has no application here.

Petitioner cannot accurately claim that the City made "no effort" to provide him with a reasonable accommodation since the City in fact made such an accommodation to petitioner through collective bargaining with his union:

> [T]he City and the union agreed to provide certain police officers the option to transfer districts for whatever reason without a diminution in their pay or benefits. This understanding was reflected in the CBA, and Officer Rodriguez was aware that the CBA provided him with this option.

Pet. App. 31a. Thus petitioner's claim that no accommodation was made available to him is unsupported by the record.

While petitioner claims that the City should have formally responded to his written request for an exemption from clinic duty, he of course does not dispute that Capt. Guswiler told him that he could obtain no blanket exemption. And petitioner in any event identifies no case in which an employer that had made an accommodation available was nevertheless held liable when, as here, the employee was in fact aware of that

accommodation. Indeed the circuits have consistently held that when an employee is aware that an accommodation is available to him, the employer has no liability for the employee's failure to utilize a reasonable accommodation of which he was aware. See, *e.g.*, *Hudson*, 851 F.2d at 266-67; *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 146 (5th Cir. 1982); *Redmond v. GAF Corp.*, 574 F.2d 897, 902 & n.12 (7th Cir. 1978); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), cert. denied, 434 U.S. 1039 (1978); *City of Albuquerque*, 545 F.2d at 113-14.

By contrast, in each of the cases on which petitioner relies, the employer had made no reasonable accommodation available at the time that an employee was forced to perform duties inconsistent with his religious beliefs. See *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993); *EEOC v. University of Detroit*, 904 F.2d 331, 334-35 (6th Cir. 1990); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1487-89 (10th Cir. 1989), cert. denied, 495 U.S. 948 (1990); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1413 (9th Cir. 1989); *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 615 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989); *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116, 119 (4th Cir. 1988), cert. denied, 488 U.S. 924 (1988); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 406 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *Anderson v. General Dynamics*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 432 U.S. 921 (1979). Cf. *Soldinger v. Northwest Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 752-53, 761-66 (Cal. App. 1996) (similar ruling under state statutory counterpart to Title VII). Plainly, then,

these employees could not have been aware of any accommodation to them.

Thus the cases on which petitioner relies stand for no more than the proposition that when the employer has not previously made accommodations available, it must, of course, respond to an employee's request for one. But that was not the case here. Here, petitioner was fully aware of the numerous options available to him under the CBA by which he could reconcile his job with his religious beliefs. As the court of appeals noted, without contradiction from the petitioner, "it is undisputed that as a 16-year veteran of the police force, [petitioner] was aware of the options available to him under the union contract that could accommodate his religious conflict." Pet. App. 16a. While petitioner correctly observes that an employer must offer some accommodation on request, at least if it can be provided without undue hardship, nothing in the decision below is inconsistent with an employer's statutory duty to ensure that an employee is aware of any accommodation that it can reasonably make available to him. Indeed, the court of appeals expressly acknowledged that statutory obligation. See Pet. App. 31a. That court held only that when the employee is already aware of a means that is contractually available to him by which he can obtain a reasonable accommodation of his religious beliefs, the employer cannot be held liable merely because it has failed expressly to reject the employee's request for additional accommodation before the employee is called upon either to exercise his contractual rights or perform duties to which he has a religious objection. This is the only result consistent with this Court's holding in *Philbrook* that as long as an employer makes at least one

reasonable accommodation available to the employee, even if the employee seeks some other accommodation, "the statutory inquiry is at an end." 479 U.S. at 68. Here, petitioner was aware that the City, through the CBA, had made available an accommodation which would have eliminated the conflict between petitioner's religious beliefs and his official duties. Accordingly, since the accommodation was undisputedly available to petitioner, the City discharged its statutory obligations.

Not only has petitioner failed to establish that his claim would have succeeded in any other circuit, but he can adduce no justification in logic or policy for the rule he advocates, which would create a new obligation requiring an employer to remind its employees of those available accommodations of which they are already aware. Surely the facts of this case do not argue for such a rule. Petitioner knew of several accommodations available by contract that would have obviated the need for him to perform duties to which he had a religious objection. He also knew that his watch commander had not granted him the blanket exemption from clinic duty that he had requested. Plainly, then, it was up to petitioner to utilize the available and reasonable accommodation. As we explain above, there is little point in holding the City liable for failing to tell an employee about options of which he is already fully aware that will accommodate his religious beliefs.

Nor does petitioner explain why the court of appeals' holding on this point involves a recurring question of sufficient import to merit plenary review. Surely most employees will utilize those reasonable accommodations available to them under a CBA and of which they are

aware, instead of suing merely because the employer does not remind them of their contractual rights. Indeed petitioner cannot identify even a single case other than this one in which an employee predicated a Title VII claim on his own failure to utilize an accommodation to which he was contractually entitled and of which he was aware, merely because the employer failed to remind the employee of his contractual entitlement.[7] Accordingly, there is no basis for concluding that the issue identified by petitioner merits this Court's plenary review.

3. Petitioner's approach is flawed in another respect as well. An employer is never required to provide an accommodation that would cause it undue hardship. See *Hardison*, 432 U.S. at 84. An "undue hardship" is caused by any accommodation that requires the employer to bear more than de minimis costs. See *id.* And the "costs" relevant to this calculus include not just actual expenditures, but also "lost efficiency" and the costs associated with creating accommodations that treat employees unequally on the basis of their religious beliefs. See *id.* at 80-81, 84. Here, because the accommodation petitioner seeks would impose more than de minimis costs, it is not "reasonable" within the meaning of Title VII. Accordingly it would not be statutorily required regardless of the correctness of the holding below on the CBA.

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[7] Petitioner seems to suggest that *EEOC v. Hacienda Hotel* is such a case. See Pet. 15-16 & n.44. In fact, in that case liability was predicated on the court's conclusion that the applicable CBA offered employees no reasonable accommodation of their religious beliefs. See 881 F.2d at 1513.

The record in fact makes perfectly clear that the accommodation petitioner seeks—an exemption from all assignments at abortion clinics except in circumstances that petitioner judges to be exigent—would impose significant costs on the Chicago Police Department. That is because the accommodation must naturally be offered not only to petitioner, but to any other police officer who voices a religious objection to a particular assignment. The Chicago Police Department comprises more than 13,000 sworn members. R. 52 at Exh. C, ¶ 12. Permitting all officers to decline particular assignments for religious reasons absent exigent circumstances in a police department of this size and complexity poses quite significant problems.

In Chicago, because of the high volume of calls received by the police dispatching system, radio air-time must be kept to a minimum. R. 52, ¶ 73. In fact, the Police Department considers conserving radio air-time to be a critical safety issue. R. 60, ¶ 181. In making assignments, dispatchers know only which cars are available. R. 52, ¶ 67. They have no way of knowing who is in those cars or whether those officers have some personal objection to responding to certain assignments. *Id.* ¶¶ 67-68, 70. Thus, an officer's refusal of an assignment based on religious beliefs would tie up air-time, delay response to the call to which the officer was refusing to respond, and delay response to all other calls. R. 60, ¶ 184.

Petitioner's proposed accommodation causes undue hardship for the additional reason that it would undermine the Police Department's command structure. Petitioner is willing to respond to emergencies at clinics,

but he could not define what constitutes an emergency. R. 52, ¶¶ 48-50; R. 52 at Exh. J at 127-51, 173-96. Apparently, as part of petitioner's "accommodation," the Department would have to let him define what constitutes an emergency assignment. This is an undue hardship; it interferes with the Department's ability to run a paramilitary organization in an orderly manner by subjecting to dispute a superior's determination of when the need for his assistance at an abortion clinic is sufficiently pressing to overcome a religious objection. And, again, precious radio time would be consumed as officers and supervisors confer on whether a particular assignment is sufficiently urgent that an officer's religious objection can be overcome.[8]

Neither of the questions presented in the petition for certiorari even places at issue the question whether the only accommodation petitioner has ever identified in this litigation as satisfactory to him is in fact a reasonable accommodation within the meaning of Title VII. For that reason, even if the Court grants petitioner plenary review, it may well conclude that the questions he has presented are not appropriately reached, since the judgment can be affirmed on other, quite fact-specific grounds. For that reason as well, plenary review is not warranted.

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[8] Petitioner also does not address Chief Judge Posner's view that Title VII simply does not require a law enforcement agency to accommodate an employee who is unwilling to live up to his obligation to enforce the law impartially regardless of his own beliefs. See Pet. App. 32a-36a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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